SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 23.

HARRY H. SHOCK, SURVIVOR OF MARTIN SHOCK, DECEASED, INDIANA, PLAINTIFF IN ERROR,

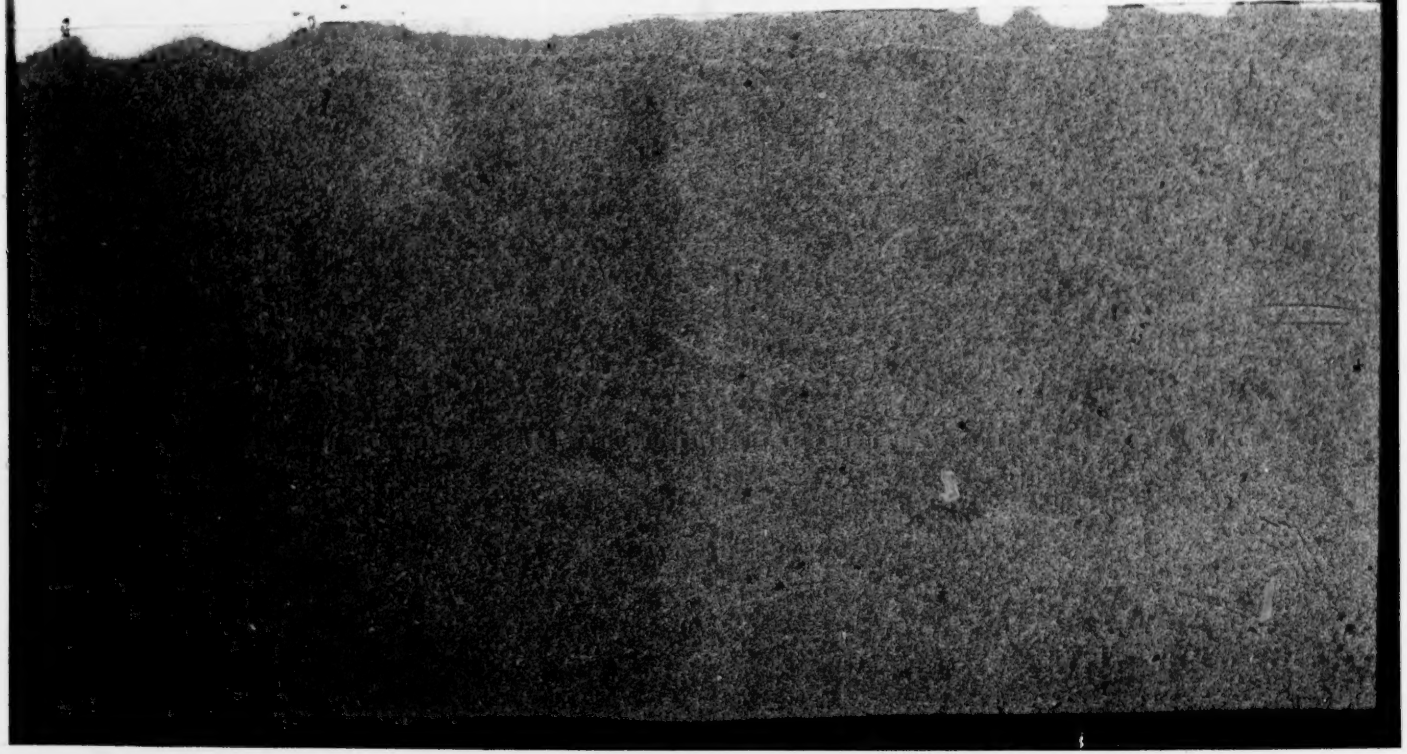
vs.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED JULY 6, 1904.

(18,609.)



(18,600.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 81.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 June 18/1902 Rec'd of def't $15.00 on pay't cost of transcript

GEO. B. ELLIOTT, *Cl'k.*

STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore, to-wit: on the 18th day of June, 1902, the same being the 21st judicial day of the May term, 1902, of said court, Harry B. Smith, auditor of Marion county, Indiana, by his attorneys, filed in the office of the clerk of the supreme court of the State of Indiana, a transcript of the record and proceedings in the Marion circuit court, of said State, in a cause wherein State of Indiana on the relation of Martha Lewis and Benjamin Lewis were plaintiffs, and said Harry B. Smith, auditor of Marion county, was defendant, together with an assignment of errors and joinder in error indorsed thereon; which transcript, assignment of errors and joinder in error together with an appeal bond, were filed in this court in term, and are in the words and figures following, to-wit:

2 Be it remembered, that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, etc., in the circuit court of the county of Marion in the State of Indiana, are the following in the cause of

STATE OF INDIANA on the Relation of MARTHA Lewis, Benjamin Lewis,
v.
HARRY B. SMITH, Auditor of Marion County. } Number 10986.

Be it also remembered. That heretofore, to-wit: on the 10th day of May, 1901, the above named relators filed in the office of the clerk of said circuit court their complaint against said defendant in the words and figures following, that is to say:

Complaint.

"STATE OF INDIANA, *County of Marion,* } *ss:*

STATE OF INDIANA on the Relation of Martha Lewis and Benjamin Lewis
v.
HARRY B. SMITH, Auditor of Marion County. } No. 10986. Circuit Court. Petition for Mandate and Prohibition.

The relators in the above entitled cause, by leave of the court first had and obtained, respectfully submit to the court their cause of

action for a writ of mandate and prohibition. And would
3 state as their cause of action that they are *bona fide* residents of the city of Indianapolis, Marion county, Indiana, and as such, on the first day of March, 1900, were the owners of certain real estate, to-wit: lot No. 611 in McCarty's 12" West Side addition to the city of Indianapolis, Indiana, on which the relators executed a certain mortgage to one Nicholas McCarty aggregating about $500.00 which is still due and unpaid; that a copy of said deed to said real estate is filed herewith and made a part of this complaint marked "Exhibit A."

That said Martha Lewis, one of said relators above mentioned, who having full authority to act for herself and her husband, did on the 30th day of April, 1900, claim her rights and immunities under the law of said State, for herself and said husband, by filing her affidavit as the law requires, with the auditor of said county above mentioned, setting forth that there was a mortgage due and unpaid, as above mentioned, and that the same was recorded in Record 323 page 395 in the recorder's office of Marion county, Indiana, a copy of which mortgage is filed herewith marked "Exhibit B."

That after filing said affidavit of exemption, as above mentioned, a copy of which is filed herewith and marked "Exhibit C," said relators demanded an allowance to be made to them by said auditor for the amount of said mortgage, that so much of their property be exempted from taxation and their property be released from said burden of taxation as in such cases made and provided.

That said auditor then and there refused to so allow the said relators any exemption whatever on their indebtedness as hereinbefore mentioned, and wholly disregarded their said affidavit, and charged said relators the full amount of taxes assessed against them, and informed them that it was necessary for them to both file
4 their affidavits showing the fact that the said indebtedness existed on account of said property, held by them, was an entirety.

Said relators then paid all taxes due, excepting so much as was and still is claimed as exempt from taxation, for the reasons hereinbefore stated, and exhibited to said auditor the deed for said property, and with it an additional affidavit alleging the material facts as recited in the affidavit filed by Martha Lewis his wife, and showing that she had full authority to act for both said relators, a copy of which is filed herewith, to-wit:

"To the auditor of Marion county, Ind.:

"I, the undersigned, *who* being duly sworn, upon oath, state that I am the husband of Martha Lewis who is the joint owner with me in lot No. 611 in McCarty's 12th West Side addition to the city of Indianapolis, Ind., and that she had full authority from me to execute a certain exemption affidavit as to the existence of a certain mortgage executed by us to Nicholas McCarty aggregating *to* about $500.00, which we claim is exempt from taxation as against our

property, that said mortgage is recorded in Book 323 page 395, in the recorder's office of Marion county, Indiana.

(Signed) BENJAMIN LEWIS."

Subscribed and sworn to before me this 7th day of May, 1901.

[SEAL.] W. B. SCHWARTZ,
Notary Public.

" My commission expires Oct. 26, 1901."

Which affidavit was also filed with said auditor of Marion county, Indiana, in addition to all the other facts hereinbefore set forth, and again demanded of said auditor to exempt from taxation so much of the property of the said relators as is represented by said
5 mortgage held by the said Nicholas McCarty and that the mortgage be assessed for taxation as the law directs; all of which said auditor then and there refused and still refuses to so allow said exemption as prayed for by the said relators.

Wherefore, the relators pray this court that an alternative writ of mandate may issue commanding said defendant Harry B. Smith, auditor of said Marion county, Indiana, to allow the exemption prayed for by said relators on the mortgage of $500.00 as set forth, and the same be deducted from the value of the real estate described in their deed, or so much thereof as the law directs in such cases made and provided.

BENJAMIN LEWIS."

Subscribed and sworn to before me this 9th day of May, 1901.

WM. B. SCHWARTZ,
Notary Public."

My commission expires October 26, 1901.

W. B. SCHWARTZ,
Att'y for Relators."

6 EXHIBIT A.

This indenture witnesseth, that we, Nicholas McCarty (unmarried), of Marion county, in the State of Indiana, Margaret R. McCarty Harrison and John C. S. Harrison, her husband, of Los Angeles county, in the State of California (formerly of Marion county, in the State of Indiana), Frances J. McCarty (unmarried), Henry Day (unmarried), Henry McCarty Day (unmarried), and Margaret McCarty Day (unmarried), of Marion county, in the State of Indiana, convey and warrant to Benjamin Lewis and Martha Lewis his wife, of Marion county, in the State of Indiana, for the sum of four hundred and fifty ($450.00) dollars, the following real estate, in Marion county, in the State of Indiana, to-wit: Lot numbered six hundred and eleven, (611) in McCarty's 12th West Side addition to the city of Indianapolis, according to the plat of said addition as recorded in the office of the recorder of the said county of Marion, in Plat Book No. 10, page 67.

In witness whereof, the said Nicholas McCarty has hereunto set

his hand and seal, this 21st day of January, 1897; and said Margaret R. McCarty Harrison and John C. S. Harrison, her husband, Frances J. McCarty, Henry Day, Henry McCarty Day and Margaret McCarty Day, by Nicholas McCarty, their attorney in fact, have hereunto set their hands and seals this 21st day of January, A. D. 1897.

NICHOLAS McCARTY, [SEAL.]
MARGARET R. McCARTY HARRISON, [SEAL.]
JOHN C. S. HARRISON, [SEAL.]
FRANCIS J. McCARTY, [SEAL.]
HENRY DAY, [SEAL.]
HENRY McCARTY DAY, [SEAL.]
MARGARET McCARTY DAY, [SEAL.]
By NICHOLAS McCARTY,
Their Attorney in Fact. [SEAL.]

STATE OF INDIANA, }
Marion County, } *ss:*

Before me, the undersigned, a notary public in and for said county, this 21st day of January 1897, Nicholas McCarty, acknowledged the execution of the annexed deed; and Margaret R. McCarty Harrison and John C. S. Harrison, her husband, Frances J. McCarty, Henry Day, Henry McCarty Day, and Margaret McCarty Day, by Nicholas McCarty, their attorney in fact, acknowledged the execution of the annexed deed.

Witness my hand and notarial seal, this 21st day of January, 1897.

WM. R. A. DELL, [SEAL.]
Notary Public.

7 EXHIBIT B.

This indenture witnesseth, that Benjamin Lewis and Martha Lewis his wife of Marion county, in the State of Indiana, mortgage and warrant to Nicholas McCarty, of Marion county, in the State of Indiana, the following real estate, in Marion county, in the State of Indiana, to-wit: lot numbered six hundred and eleven, (611) in McCarty's 12th West Side addition to the city of Indianapolis, according to the plat of said addition as recorded in the office of the recorder of the said county of Marion, in Plat Book No. 10, page 67, to secure the payment, when they shall severally become due, of eight (8) promissory notes of fifty ($50.) executed by the said mortgagors, one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), years after date respectively, negotiable and payable at the Indiana National Bank, of Indianapolis, Indiana, with interest at the rate of 8 per cent. per annum from date until maturity, payable annually, and with interest at the rate of eight per cent. per annum after maturity until paid, and five per cent. attorney's fees, value received, without any relief whatever from valuation or appraisement laws of the State of Indiana, said note- executed as aforesaid, for the unpaid

purchase money due upon said real estate, and the mortgageor- expressly agree to pay the sum of money above secured, without relief from valuation or appraisement laws, and upon failure to pay any of said notes at maturity, and the interest on all of said notes as the same shall become due, then all of said notes and the interest thereon shall be due and collectible, and this mortgage may be foreclosed accordingly.

In witness whereof, the mortgageors have hereunto set their hand- and seals, this 21st day of January, A. D. 1897.

BENJAMIN LEWIS. [SEAL.]
MARTHA LEWIS. [SEAL.]

STATE OF INDIANA, } ss:
Marion County, }

Before me the undersigned, a notary public in and for said county, this 21 day of January, 1897. Benjamin Lewis — Martha Lewis his wife acknowledged the execution of the annexed mortgage.

Witness my hand and notarial seal, this 21 day of January 1897.

WM. H. A. DELL, [SEAL.]
Notary Public.

[Endorsed:] Mortgage. Short form. Benjamin Lewis to Nicholas McCarty Received for record, this 12 day of Feb. A D. 1897, at 4 o'clock, p. m., and recorded in Record 323, page 395. —— —— recorder Marion county, Indiana.

8 EXHIBIT C.

Form No. 1526.

Affidavit of Mortgage Indebtedness.

STATE OF INDIANA, } ss:
Marion County, }

Martha Lewis being duly sworn, upon oath deposes and says that -he is the owner of the following-described real estate situated in Center township, Marion county, Indiana, to wit:

Lot number six hundred and eleven (611) in McCarty's West Side addition to the city of Indianapolis, according to the plat of said addition in Plat Book 10, page 67.

That there is an actual *bona fide* mortgage indebtedness of four hundred and fifty ($450.) dollars existing against said real estate, and that the same was unpaid on the first day of April, 190–; that the name of the mortgagee, to whom said mortgage was given, is Nicholas McCarty; that he resides in Indianapolis, Ind.; that said mortgage is recorded in Record No. 323, page 395, in the recorder's office of —— county, Indiana, and that the following is a description of the land on which said mortgage exists, viz: Lot No. 611 in McCarty's 12th West Side addition, in Plat Book No. 10 page 67 of the recorder's office of Marion Co. Ind. That this affidavit is made

for the purpose of having said mortgage indebtedness deducted from the assessed valuation of said mortgaged premises for the year 190–, as provided by an act of the General Assembly of the State of Indiana, entitled "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency."

MARTHA LEWIS.

Subscribed and sworn to before me, this 28 day of April 1900.

[SEAL.] WM. B. SCHWARTZ,
Notary Public.

My com. expires July 24, 1900.

NOTE.—Not exceeding $700 of mortgage indebtedness can be deducted. No deduction shall be allowed greater than one-half the assessed valuation of the real estate mortgaged.

[Endorsed:] No.—. Affidavit of mortgage indebtedness of Martha Lewis —— township, Marion county, Ind. Year 190–, $— Amount allowed, $— Filed Apr. 30 1900 —— ——, auditor —— county.

9 And afterwards, to-wit: on the 22nd day of May, 1901, being the 15th judicial day of the May term, 1901, of said Marion circuit court, before the Hon. Henry Clay Allen, sole judge thereof, the following proceedings were had herein, viz:

Order for Allowance of Writ.

"Come said relators and having heretofore filed their verified complaint in this cause, wherein they pray that an alternative writ of mandate issue out of this court, commanding the defendant to exempt certain property from taxation in the sum of $500.00, that sum is due and owing to one Nicholas McCarty on a certain mortgage on lot No. 611 in McCarty's 12th West Side addition to the city of Indianapolis, Indiana.

And the court having examined said complaint, and being advised in the premises, now orders that an alternative writ of mandate issue commanding the defendant to allow said exemption, as prayed for by said relators, or that he appear in this court on the 27th day of May, 1901, at 9 o'clock a. m. and show cause, if any he may have, why said exemption prayed for should not be allowed."

"Said alternative writ of mandate is in the words and figures following, viz:

10 *Alternative Writ.*

STATE OF INDIANA, } *ss:*
County of Marion, }

Marion Circuit Court.

STATE OF INDIANA on Relation of Martha Lewis, Benj. Lewis,
vs.
HARRY B. SMITH, Auditor of Marion County.

No. 10986. Alternat-e Writ of Mandate.

The State of Indiana to Harry B. Smith, auditor of Marion county:

Whereas Martha Lewis and Benjamin Lewis as relators in the above entitled cause have filed their sworn petition and therein allege, that they are *bona fide* residents of the city of Indianapolis, Marion county Indiana, and as such on the 1st day of March 1900, were the owners of certain real estate in said county and State, to-wit: Lot No. 611, in McCarty's 12th West Side add. to the city of Indianapolis, Ind.

That said relators executed a certain mortgagr aggregating about $500.00 *dollars*, to one Nicholas McCarty, of Indianapolis, Ind. which mortgage is still due and unpaid, that said relators on or about the 30th day of April 1900, claimed their rights and immunities under the laws of said State, as citizens thereof, by filing the affidavit of Martha Lewis, one of said relators, with the auditor of said county setting forth the fact that there was a mortgage on said lot as above mentioned and that the same was due and unpaid.

All of which facts as well as others were set forth in relator's petition above mentioned, and said relators demanded of said auditor to exempt so much of their property from taxation as should be found unpaid, as a matter of right under the law in such cases made and provided, and that the amount so found owing to the said Nicholas McCarty, on said mortgage be assessed to him, and that they be relieved from said burden of taxation, all of which the said auditor defendant, then and there refused, which refusal was arbitrary, without right and contrary to law on the part of said auditor, said above named defendant.

Now therefore, you the said Harry B. Smith, auditor of Marion Co. Indiana, *is* commanded to allow said exemption as prayed for by said relators upon the affidavit filed by the said Martha Lewis, and that said relators be relieved from the burden of taxation, or so much thereof as they are entitled to according to the valuation of said real estate, and that said amount so exempt from taxation be assessed against the said mortgagee Nicholas McCarty, and that the same shall be done without further excuse or delay, least in your default, complaint should come to me repeated.

Or upon your refusal to grant the prayer of said relators, as by them prayed for, and disobey this writ, you are commanded to ap-

pear before this court, on the 27 day of May, 1901, at 9 o'clock a. m. and show cause why the same should not be done, and have then and there this writ.

Witness my hand and seal of this court, this 23 day of May, 1901.

GEO. B. ELLIOTT,
Clerk Marion Circuit Court.

[SEAL.]

11 [Endorsed:] No. 10986. State of Indiana, *ex rel.* Marthe Lewis, *v.* Harry B. Smith, auditor. Alternative writ.

Sheriff's Fees.

Serv.	40
Mil.	20
Copy	25
D. & P.	20
	$1.05

W. B. Schwartz.

Return to Alternative Writ.

"Came to hand May 23, 1901, and served the within named Harry B. Smith, auditor of Marion county, Indiana, by delivering to him the original writ, of which this is a true copy, May 23, 1901.

EUGENE SAULCEY,
Sheriff of Marion County."

12 And afterwards, to-wit: on the 27th day of May, 1901, being the 19th judicial day of the May term aforesaid of this court, before the same hon. judge, the following proceeding was had herein:

"Come the parties by counsel and the defendant files a demurrer to the complaint herein in these words and figures, viz:

Demurrer of Def't.

"STATE OF INDIANA, } *ss:*
Marion County, }

STATE OF INDIANA *ex Rel.* MARTHA Lewis and Benjamin Lewis
v.
HARRY B. SMITH, Auditor Marion County.

No. 10986, Circuit Court. Demurrer of Defendant.

The defendant Harry B. Smith, auditor of Marion county, Indiana, demurs to the complaint and affidavit and alternative writ in this cause, and says that neither said complaint, affidavit nor writ states facts sufficient to constitute a cause of action against him, and

does not state facts sufficient to require this defendant to make further return thereto.

HAWKINS & SMITH,
Att'ys for Def't.

And afterwards, to-wit: on the 12th day of June, 1901, being the 9th judicial day of the June term, 1901, of said court before
13 the same hon. judge, the following proceedings were had herein:

Demurrer Sustained.

"Come the parties by counsel, and the court being sufficiently advised in the premises, does now sustain the demurrer to the complaint herein, to which ruling of the court the relators, at the time, except, and decline to plead further, but elect to stand on said complaint; and the court now renders judgment on the demurrer.

Judgment.

It is therefore considered and adjudged by the court that the relators take nothing by their suit herein, and that the defendant recover of the relators his costs herein taxed at $—."

And afterwards, to-wit: on the 1st day of March, 1902, there was filed in the office of the clerk of said Marion circuit court, a notice from the clerk of the supreme court of Indiana, of a reversal in this cause, as follows, viz:

Notice of Reversal in Supreme Court.

"THE STATE OF INDIANA:

In the Supreme Court, November Term, 1901.

Present: Hon. James H. Jordan, chief justice; Hon. John V. Hadley, Hon. John H. Gillett, Hon. Alexander Dowling, Hon. Leander J. Monks.

In the case of—

STATE *ex Rel.* MARTHA LEWIS ET AL. *v.* HARRY B. SMITH, Auditor, etc. } No. 19752. Appealed from the Marion Circuit Court (10986).

To the clerk of the circuit court of said county, Greeting:

You are hereby notified that the supreme court of said State has on this day reversed the judgment of the court below in the above entitled cause.
14 Sixty days from the date hereof will be allowed for the filing of a petition for a rehearing, unless otherwise ordered by the court.

"THE STATE OF INDIANA, *ss:*

I, Robert A. Brown, clerk of the supreme court of said State, certify that the above is a true statement of the decision of said court in the above entitled cause.

Witness my name and the seal of said court, this 28th day of February, 1902.

[SEAL.] R. A. BROWN,
Clerk Supreme Court.

Filed March 1, 1902.
GEO. B. ELLIOTT, *Clerk.*"

And afterwards, to wit: on the 24th day of May, 1902, being the 18th judicial day of the May term aforesaid of this court, before the same hon. judge, the following proceedings were had herein:

Redocketing of Cause; Demurrer Overruled.

"Come the parties and the court in accordance with the ruling of the supreme court of Indiana herein, now overrules the said demurrer to the application for an alternative writ of mandate herein, to which ruling of the court the defendant, at the time, excepts.

And now, by order of the court, the said opinion of the supreme court, on file in this cause, is ordered spread of record upon the order book of this court, and is as follows, viz:"

15 *Opinion of Supreme Court.*

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1902.

On the 28th day of February, 1902, being the 83rd judicial day of said November term, 1902.

Hon. James H. Jordan, chief justice; Hon. John V. Hadley, Hon. John H. Gillett, Hon. Alexander Dowling, Hon. Leander J. Monks, justices.

In the case of—

STATE *ex Rel.* MARTHA LEWIS ET AL. *vs.* HARRY B. SMITH, Auditor, etc. } No. 19752. Appeal from the Marion (10986) Circuit Court.

Came the parties by their attorneys, and the court being sufficiently advised in the premises gave the following opinion and judgment pronounced by Gillett, J.

Monks and Dowling, JJ., dissent.

Dissenting opinion by Dowling, J.

Petition for a rehearing overruled.

16 *Opinion.*

This is an action of mandamus, instituted by the appellant's relators against the appellee. The appellee filed a demurrer to the application and alternative writ, which was sustained by the court below. To this ruling the relators excepted, and refused to plead further, and from the final judgment against them that was subsequently rendered, they prosecute this appeal.

Counsel discuss but one question in this case, namely, the constitutionality of an act of the General Assembly of this State, entitled, "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency." Acts 1899, p. 422, §§ 8417*a et seq.*, Burns 1901; §§ 6272*a et seq.*, Horner 1901. The first three sections of the act are as follows:

SEC. 1. "Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate."

SEC. 2. "Any person desiring to avail himself, or herself, of the provisions of this act, shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situated a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which said incumbrance exists."

SEC. 3. "The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana, other than the one wherein such real estate is situate,
17 shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

The fourth section of the act prescribes a penalty for wilfully making a false statement under section two thereof. The fifth and last section declares the existence of an emergency for the immediate taking effect of the act.

Counsel for appellee claim that the act in question is unconstitutional, and they especially insist that it contravenes § 1 of article 10 of our State constitution. That section is as follows: "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

We approach the consideration of this case with a deep sense of its importance, not only because constitutional questions are involved, but because we realize that this act, if upheld, will be a large factor in our revenue system.

The people, in their grant of power to the agencies of government, ordained that "the powers of government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial." Const. Ind., § 1, art. 3. These departments are co-ordinate. The constitution requires that any person elected or appointed to any office thereunder shall, before entering on the duties thereof, take an oath or affirmation to support such constitution. § 4, art. 15. The judiciary do not lay claim to a conscience that is quickened beyond that of any other official. The courts do not sit for the purpose of revising or obstructing legislative action, but to enforce the legislative will. Where, however, an enactment of the General Assembly falls within the domain of legislative power, or impinges on the limitations which the people, in their sovereign capacity, have hedged the grant of legislative power about, a court, that sits to apply the law as between litigants, refuses to enforce it, because the judge, acting on the responsibility of his oath, must enforce the will of the people, as declared in their primal social compact,
18 rather than the will of their agent in another department of the government. The task of declaring a legislative enactment unconstitutional is at once both solemn and delicate, and while the courts will not decline this responsibility, yet they approach such a duty in a spirit of profound caution and circumspection and with a disposition to enforce the legislative will, by resolving all ultimate reasonable doubts in its favor. It is with this disposition of mind that we approach this question.

The power of taxation is an incident of sovereignty, and is possessed by the Government without being expressly conferred by the people. State Board, etc. *v.* Holliday, 150 Ind. 216. The power belongs to that class of powers known as political powers, and while, in the genesis of popular government, it was occasionally exercised by the executive branch of the Government, yet it is now well settled that the power of taxation is purely a legislative function. State Board, etc. *v.* Holliday, *supra*; Union Tel. Co. *v.* Mayer, 28 O. St. 521. "The extent to which it, the taxing power, shall be exercised, the subjects on which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of

the legislature to which the States commit the exercise of power. The discretion is restrained only by the will of the people, expressed in the State constitution or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the Federal Government." Lane County *v.* Oregon, 7 Wall. 71, 77. And see also, Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 160. This doctrine is even more forcibly stated by Judge Cooley, in his work on taxation (p. 5). He there says: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitations upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes. And not only is the power unlimited in its reach as to subjects, but in its nature it acknowledges no limits, and may be carried to any extent which the Government may find expedient. It may therefore be employed again and again upon the same subjects, even to the extent of exhaustion and destruction, and may thus become in its exercise a power to destroy. If the power be threatened
19 with abuse, security must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, shall keep within the limits of legislative authority and violate no express provision of the constitution. The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity which will admit of no property or other conflicting right in the citizen while it remains unsatisfied."

Our State constitution does, however, contain some limitations on the legislative authority to tax. These limitations are found in the section of the constitution hereinbefore quoted, and in another section thereof, to which attention will hereafter be directed. Does the act in question violate the constitutional requirement of equality?

It is the theory of every republican government that taxes should be levied equally, but this is impossible, even in the simplest state of society, and the difficulty becomes more and more pronounced as our civilization becomes more complex, because the circumstances and pursuits of the people become more diversified. "A just and perfect system of taxation," says Chancellor Kent, "is yet a desideratum in civil government" (2 Com. 332). "Perfectly equal taxation," it has again been said, "will remain an unattainable good as long as laws and government and men are imperfect." Sharswood, J., in Grim *v.* School Dist., 57 Pa. St. 433, 437.

As a general rule, taxes due on property are not debts of the owner thereof. Thompson *v.* McCorkle, 136 Ind. 484. But it is, nevertheless, competent for the legislature to so provide. Snipe *v.* Shriner, 44 N. J. L. 206. If it can be fairly said that the equality limitation in the constitution was designed to prevent inequalities in the assessment of different tracts of real estate, considered as a

matter wholly apart from the interest of their owners therein, then there would be room for serious doubt as to the justification of legislation that discriminates within the class, and which permits a deduction of $700 in the assessment on one tract of mortgaged real estate, while that right is wholly denied as to an adjoining unincumbered tract of real estate. We do not think, however, that the people of Indiana, in adopting the constitution of the State, had any such view. Taxes must be paid by persons—unless property is sacrificed therefor—and, moreover, the
20 whole idea of values is one of the artificialities of life. It therefore follows that when the people put the equality limitation upon the power to tax, they intended thereby to protect the owners of property. We must therefore regard the limitation that taxation must be equal as being satisfied when there is no discrimination as between taxpayers. Clearness is necessary here, however, and we therefore suggest, by way of emphasis, that our present statements relate only to the requirement of *equality* in taxation. Still dealing with this particular portion of the limitation, we next call attention to the fact that the selection of some objects for taxation and the omission of others, or even the selection of but a few objects for taxation, does not necessarily disturb the rule of equality, provided that the result of the imposition of the burden is to ultimately so diffuse itself among those who ought to bear their share of it as not to unreasonably lay it on particular classes of taxpayers, to the ease of the rest. "Let it reach all of a class," says Judge Cooley, "either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible." Cooley on Taxation, 169.

We may freely grant that with this act in force it will produce inequalities as between taxpayers in any given year, but we confidently affirm that it is beyond the ken of the most astute to say who will receive the most benefit from the act in the future. If one man gains an advantage over his neighbor this year, by means of this statute, it can not be said that the latter's property affairs may not hereafter be in such condition that he will not receive more of benefit from the statute than the former. As the act is presumed to represent a constitutional exercise of the legislative power it devolves upon those who would assail it as unequal or class legislation to point out what class of persons will hereafter be prejudiced thereby. Laws are rules of action, projected through and beyond the multifarious interests and affairs of mankind, and it is too much to affirm that they must at all times operate fairly, as applied to any individual, and particularly, as we have shown, is it too much to affirm that a tax law must always so operate.

21 If the power of taxation is a legislative function, and if it be true that in any system of taxation, however wisely framed,

disproportionate shares of the public burden will occasionally be thrown on some persons, it must needs follow that the courts must admit that there exists in the General Assembly a large measure of discretion in the enactment of a scheme of taxation. To borrow something from the language and thought of another court: It is the peculiar duty of a court to keep the first lines of the constitution clear, and not to stretch its power to correct legislative abuses. We do not mean to hold that statutory provisions relative to the levying of taxes might not so far on their face manifest, by invidious discriminations between persons and property, their unequal and unjust character as to call on the courts to refuse to enforce them, but as observed by Gibson, C. J., in Kirby *v.* Shaw, 19 Pa. St. 258, 261, "It is illogical to argue from an extreme case; or from the abuse of power to a negative of it. Every authority, however indispensible, may be abused; and if it might not it would be powerless for good."

As to the requirement of uniformity, we have to say that the act in question purports to be a law that is uniform throughout the State, and as it permits all persons to take advantage of it, when their circumstances bring them within its operation, we are of the opinion that it does not violate that requirement of the constitution. Cleveland etc. R. Co. *v.* Bachus, treas., 133 Ind. 513; Pittsburgh etc. R. Co. *v.* Bachus, treas., 133 Ind. 625; Gibson *v.* Board Com. etc., 128 Ind. 65.

It is our judgment that every limitation upon the power to tax that is found within the limits of § 1 of art. 10 of our constitution was intended, at least primarily, to protect the taxpayer, but it must be admitted that the latter part of the section, requiring the General Assembly to prescribe such regulations as shall secure a just valuation for taxation of all property that the constitution does not authorize to be exempted, looks to still further protecting the taxpayer in the matter of equality, by prescribing a duty upon the General Assembly to provide for the securing of a *just* valuation for taxation of *all* property, except as aforesaid. The decisions of this court have thoroughly committed it to the proposition that legislative enactments that purport to grant exemptions, not falling within the class of exemptions mentioned in the constitution, are void. State
22 *ex rel.* Morgan *v.* Workingmen's etc. Ass'n, 152 Ind. 278; Harn *v.* Woodard, treas., 151 Ind. 132; Deniston, aud. *v.* Terry, 141 Ind. 677; Warner *v.* Curran, 75 Ind. 309; State *ex rel.* Tieman *v.* City of Indianapolis, 69 Ind. 375.

The enactment in question cannot be supported as an exemption law. It is to be remembered, however, that the regulations that the General Assembly are required to enact must look to the securing of a *just* assessment as well as to the assessment of *all* property that the constitution subjects to taxation. We cannot subordinate the one requirement to the other. Indeed, it is a rule of construction that a constitution is an instrument of such high and solemn import that every word thereof is to be regarded as though it was hammered into place. The question therefore arises whether it is com-

petent for the General Assembly to enact a law that provides for the taxation of real estate according to the actual interest of the owner therein, or that, at least, partially effectuates that object, under that provision of the constitution that requires that the regulation shall be just?

Many cases uphold the right of a State to enact a law that apportions the value of land for taxation upon the basis of the actual interests of the mortgagor and mor gagee respectively therein. Savings and Loan Society *v.* Multnomah County, 169 U. S. 421, and cases there cited. This amounts, in effect, to taxing a mortgage at the *situs* of the land, and such a statute has been held valid even as against non-resident mortgagees. Savings etc. Society *v.* Multnomah County, *supra*. The enactment in question, although it does not operate to transfer the *situs* of the debt, amounts to an apportionment of the land value for taxation, as between the mortgagor and the mortgagee, except when the mortgage is held by a non-resident or is payable to some public and non-taxable fund. May the General Assembly enact such legislation, in its endeavor to be just? We do not mean to intimate that no law can be upheld that in its operation may result in duplicate taxation. As stated by Judge Cooley, in his work on Taxation (page 223): "We make out, therefore, no conclusive case against a tax, when we show that it reaches twice the same property for the same purpose. This may have been intended, and in many cases, at least, is admissible." But if A sells a tract of land to B for $1,000, and takes a mortgage back for the entire purchase money, and if the mortgagee be a resident of this State, there is brought into existence, in the absence of the
23 enactment in question, additional taxable property to the amount of $1,000, although it is apparent that by such transaction the State's wealth has not been increased a farthing. To what extent the State's assessment sheet is augmented by duplicate taxation, courts, that act on evidence, cannot ascertain; a public tribunal could not enter on an inquiry, unless, like a legislature, it was authorized to act on common repute and opinion.

We are disposed to place stress upon the fact that the lien which may be made the basis of a deduction is a mortgage lien, as distinguished from other liens upon real estate, general and special. While it is true that for most purposes a mortgage will be treated as a mere security for a debt, yet whenever it is necessary to render effective the rights of the parties, the courts will treat mortgages as forms of defeasible sales. Vinnedge *v.* Shaffer, 35 Ind. 341; United States etc. Co. *v.* Harris, 142 Ind. 226; Citizens' State Bk. *v.* Harris, 149 Ind. 208; Savings Society *v.* Multnomah County, *supra*. As observed by the Supreme Court of the United States, in the case last cited: "If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation."

In our opinion the General Assembly may enact a statute like the one in question, without violating the provision that it shall prescribe such regulations as shall secure a just valuation for taxation

of all property except such property as the constitution authorizes to be exempted. Gross valuations are not required. As said by this court in Florer, treas. *v.* Sheridan, adm., 137 Ind. 28, 41: "Section 1 art. 10, *supra*, does not say the *gross* (our italics) amount of all notes, accounts, and other choses in action shall be taxed, and we cannot so construe it without perverting its language and obvious meaning." In our opinion the case last cited is entirely in point, for as it is well settled that, under a constitutional provision requiring *all* property to be taxed, it is not competent to exempt solvent credits, yet this court there held that the legislative authority was sufficient to warrant the deduction of *bona fide* indebtedness from the total amount of the notes, accounts and other choses in action embraced within the taxpayer's schedule. We, therefore, perceive no difference in principle between this case and the Florer case. As the court there said: "Deductions and exemptions are two separate and distinct things, having no connection. A deduction
24 is the taking of the subtrahend from the minuend. It is a subtraction. Exemption is an immunity or privilege—it is freedom from a charge or burden to which others are subjected." Upon the subject of an allowance for debts, Judge Cooley says: "Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. Sometimes the deductions are from credits only; sometimes from mortgages, sometimes from the aggregate of personal estate. * * * The allowance is not in any proper sense an exemption, but is made by way of reaching the just amount of taxable property." Cooley on Taxation, 174. This general doctrine is also recognized by Mr. Desty. 1 Desty on Taxation, 551.

The enactment in question, while it does not go as far as it might possibly do in the direction of subjecting mortgages to taxation, does not, it is to be observed, relieve any mortgage credit from taxation that was taxable before, and the mere fact that there may have been an omission to extend the power of taxing mortgages will not invalidate the provision for a deduction from mortgaged lands, any more than the adjudged omission to provide for the taxation of paid up life insurance policies will avoid the entire legislative scheme of taxation.

We have now reached the question whether the act violates § 22 of art. 4 of the State constitution. That section provides that "the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the assessment and collection of taxes for State, county, township or road purposes." It cannot be claimed that the act is local, but the question whether it is special challenges our consideration. This court, in Indianapolis St. R. Co. *v.* Robinson, — Ind. —, 61 N. E. 197, 198, quoted the following statements, found in the case of State *v.* Parsons, 40 N. J. L., 1: "Interdicted special laws are those that rest upon a false or deficient classification. Their vice is that they do not embrace all the class to which they are naturally related. They create preferences and establish inequalities. They apply to per-

sons, things or places, possessed of certain qualities or situations, and exclude from their effect other persons, things, or places which are not dissimilar in these respects." Granting, but not deciding, that § 1 of art. 10 of our constitution and § 22 of art. 4 of that instrument overlap, in the effort to put checks upon the otherwise supreme and peremptory power of taxation, we feel that this opinion has already vindicated the act from the claim that it is discriminative as between taxpayers.

The first words in the body of the act are: "*Any* person desiring to avail himself, herself, of the provisions of this act, shall," etc. The words import universality, they are broad enough to include all persons. In Gibson *v.* Board Com. etc., *supra*, we find the following: "It is held that a statute which is of general and uniform operation throughout the State, and operates alike upon all persons, under the same circumstances, is not subject to the objection that it is special or local legislation. State, *ex rel.*, *v.* Reitz, 62 Ind. 159; McLaughlin *v.* Citizens etc. Ass'n, 62 Ind. 264; Heanley *v.* State, 74 Ind. 99; Elder *v.* State, 96 Ind. 162." Again, it was said by Frazer, J., in Hingle *v.* State, 24 Ind. 28, 31: "What is a special act? It is such as at common law the courts would not notice, unless it were pleaded and proved like any other fact." Mr. Sutherland, in his work on Statutory Construction, collects a large number of cases relative to prohibited special legislation, and his text enumerates opinions in accord with those expressed in State *v.* Parsons, *supra*. This act does not, however, amount to a special law, if we accept the view of that learned author as to what constitutes special legislation, for he says (§ 129): "The prohibition is in the way of legislation for individual cases. It is equally fatal to such legislation though it be general in form. If a statute is plainly intended for a particular case and looks to no broader application in the future, it is special or local, and, if such laws are prohibited on the subject to which it relates, is unconstitutional. The lineaments by which such cases are to be distinguished are usually so special that a law confined thereto would be anticipated to have no effect from the antecedent improbability of such a case arising. When, therefore, it is found to fit such a special case, it is deemed to have been enacted solely for it." Even if we were inclined to commit this court to the doctrine of State *v.* Parsons, *supra*, we should nevertheless be compelled to hold that the act we have been considering does not thereby stand condemned.

It has been suggested that this act is invalid by reason of the provision of the fourteenth amendment to the Federal Constitution, relative to the right to the equal protection of the laws, but as a discussion of this subject upon our part would require a reiteration, to some extent, of what has been heretofore said, we are not inclined to give further expression of our views upon this subject. As particularly applicable, however, to this question, as well as to some of the other questions that we have heretofore discussed, we quote the following statements from the Supreme Court of the United States, in the case of Magoun *v.* Ill. Trust and Saving Bank, 170 U. S. 283,

292: "Is the act open to this criticism? The clause of the fourteenth amendment especially evoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky R'd Tax Cases, 115 U. S. 321. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. Hayes *v.* Missouri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness, of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile County *v.* Kimball, 102 U. S. 704, that this court is not a harbor in which can be found a refuge from ill-advised, unequal, and oppressive State legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy, or injustice of State
27 laws is not necessarily an objection to their constitutional validity.' Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said, in The Bell's Gal R'd Co. *v.* Pennsylvania, *supra*, and Mr. Chief Justice Fuller in Giozza *v.* Tiernam, 148 U. S. 657, 'that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation.' The range of the State's power was expressed by Mr. Justice Bradley, as follows: 'It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; *it may allow deductions for indebtedness, or not allow them* (our italics). All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their constitution.' And so Mr. Justice Miller, speaking for the court in Davidson *v.* New Orleans, 96 U. S. 97, said: 'The Federal Constitution imposes no restraints on the State in regard to unequal taxation.' The court, through Mr. Justice Lamar, in Pacific Express Co. *v.* Seibert, 142

U. S. 339, was equally emphatic. He said on page 351: 'This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens.' And it was said in Merchants' & Mfrs. Nat. Bank *v.* Pennsylvania, constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision on Bell's Gap R'*f* Co. *v.* Pennsylvania." See also as bearing on the question as to the application of the fourteenth amendment, Cass
28 Farm Co. *v.* City of Detroit, 181 U. S. 396; City of Detroit *v.* Parker, 181 U. S. 399; Cleveland, etc. R'y Co. *v.* Bachus, treas., *supra*; Pittsburg, etc. R'y Co. *v.* Bachus, treas., *supra*.

It may be a matter of grave doubt whether public policy is conserved by an enactment that substitutes net values for gross values, upon a species of property upon which the State must largely depend for its maintenance, but we cannot run a race of opinion with the legislature upon this subject.

Counsel for appellee dwell at some length upon some of the crudities of the act in question. We do not deem it necessary to consider such matters. What we affirm is that the act is valid. It follows, therefore, that the court below erred in sustaining appellee's demurrer to the application and alternative writ.

Judgment reversed with instructions to the court below to overrule the demurrer to the application and alternative writ, and for further proceedings not inconsistent with this opinion.

Dowling and Monks, JJ. dissent.

29 *Dissenting Opinion.*

Dissenting opinion—DOWLING, *J.*:

After careful and impartial reflection, I am constrained to withhold my assent from the reasoning and conclusions of the opinion adopted by the majority of the court. The importance of the question presented upon this appeal renders it proper to state, with some particularity, the grounds of such dissent.

In determining the case, the court is required to interpret certain provisions of the State constitution. Those provisions relate to the highest function of government—the power of taxation. Vital to the Commonwealth, its abuse or misdirection is disasterous to the citizen. The subject occupies a conspicuous place in the organic law of the State, and the language employed concerning it is clear, forcible, and, as it seems to me, unmistakable in its meaning.

The question for decision is the constitutional validity of an act of the legislature entitled "An act concerning the taxation of real

estate encumbered by mortgage, and declaring an emergency," which took effect, if valid, March 4, 1899. Acts 1899 p. 422, §§ 8417, 8418, 8419, *et seq.*, Burns 1901.

That portion of the act necessary to be considered is contained in the first three sections, and reads as follows:

"SECTION 1. Be it enacted, etc., That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage- premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. *Provided*, That no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

"SEC. 2. Any person desiring to avail himself or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such encumbrance exists.

"SEC. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana, other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

These sections, as I believe, are plainly and directly in conflict with three separate provisions of the State constitution, namely:

First. Sec. 23, art. 1, of the bill of rights: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Second. Sec. 22, art. 4: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the assessment and collection of taxes for State, county, township, or road purposes."

Third. Sec. 1, art. 10: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal, except such only for

municipal, educational, literary, scientific, religious and charitable purposes, as may be especially exempted by law."

The act in question is subject to the following objections: (1), it violates the rule of the constitution requiring uniformity and equality in the rate of assessment and taxation; (2), the act is a special law for the assessment of taxes for State, county, township and road purposes; (3), it grants to one class of citizens privileges and immunities which, upon the same terms, will not equally belong to all citizens; and (4), it exempts from taxation real estate not held for municipal, educational, literary, scientific, religious or charitable purposes. If it shall be found upon examination that any
31 one or more of these propositions is true, then the statute must be held invalid.

All of the constitutional provisions referred to have been in force since November 1, 1851. Carefully prepared and comprehensive statutes, regulating the assessment and collection of taxes, have been adopted by the General Assembly from time to time, but from the taking effect of the State constitution until March 4, 1899, a period of nearly half a century, no statute exempted from assessment for taxation any real estate on the ground that it was encumbered by a lien of a mortgage. This circumstance is not conclusive, but as evidence of a practical interpretation of the constitution by the legislature, the failure for so great a length of time to recognize mortgage liens or lands as proper deductions from the value of the lands for the purposes of taxation, is entitled to some consideration. It is to be observed, too, that this practical interpretation of the constitution, as prohibiting such deductions, is perfectly consistent with the language of that instrument, and is reasonable and natural. Stuart *v.* Laird, 1 Cranch 299; Martin *v.* Hunters' Lessee, 1 Wheat. 304, 351; Cohens *v.* Virginia, 6 Wheat. 264, 418; Bank of U. S. *v.* Halstead, 10 Wheat. 51, 63; Ogden *v.* Saunders, 12 Wheat. 290; Minor *v.* Happersett, 21 Wal. 162; Bay City *v.* State Treas., 23 Mich. 499; McCulloch *v.* Maryland, 4 Wheat. 316; Cooley *v.* Wardens of Port of Phila., 13 How. 299; The Gennessee Chief, 12 How. 443; Rodgers *v.* Goodwin, 2 Mass. 475; Brigham *v.* Miller, 17 Ohio 446; Board *v.* Bunting, 111 Ind. 143.

Again, an examination of the act of March 4, 1899, discloses that it did not receive the approval of the governor, but became a law without his signature. While the failure of the executive to approve a bill does not affect its validity, if it becomes a law without his approval, the fact remains that one of the great departments of the State government has withheld its recognition of the statute. The non-approval of the act by the governor is, at least, suggestive of doubt in the mind of the executive *in* the validity of the law.

It is also to be noted that the act under consideration is not a part of a general statute embracing a complete system for the assessment and collection of taxes, but is sporadic in its character, and stands separate and apart from all other legislation upon the subject of taxation. Such being its nature, the inference is not
32 strained that it probably did not receive the attention which would have been accorded to it if it had constituted a por-

tion of a general statute regulating the assessment and collection of taxes.

But passing from these minor objections to those arising from the Constitution, it will be found that, if the statute is to stand, the Constitution must give way. In other words, to sustain the act the court must, in the language of Judge Story, "abrogate the text, fritter away its obvious sense, and narrow down its true limitations."

The first clause of §1, article 10 of the constitution declares that, "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation." By this clause, the principle which must govern all legislation on the subject of the assessment and collection of taxes is announced. At the very basis of every valid statute of this kind lies the condition that the rate of assessment and taxation must be uniform and equal throughout the district or locality in which the tax is levied. An assessment is defined to be a valuation made by authorized persons according to their discretion, as opposed to a sum certain or determined by law. It is a valuation of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man shall pay. Under our constitution the rule or ratio of valuation of real estate of those who are to pay the tax must be uniform and equal throughout the State, and the ratio of taxation must be uniform and equal throughout the district or locality affected.

This is the first and paramount requirement.

The second clause of §1, article 10, is evidently subsidiary to the first. It relates to the means by which a uniform and equal assessment is to be obtained. The General Assembly is to "provide such regulations as shall secure a just valuation for taxation of all property real and personal." The obvious meaning of this provision is that competent persons shall be appointed or elected as assessors to determine the valuation to be put upon property for the purpose of taxation, and that the general mode of procedure shall be fixed by law, but none of the regulations so prescribed can change the rule of uniformity and equality of valuation immovably established by the first clause of the section. The danger and abuse against which the constitution was intended to guard was an arbitrary
33 valuation of property by the State. Instead of an arbitrary and perhaps unreasonable assessment by the law itself, a *just* valuation was to be secured. In this connection, the term *just* is the equivalent of correct, honest, true. Its use requires the valuation of all property of the same kind in the same taxing district by a uniform and equal standard. By no rule of constitutional interpretation can the term "just," as used in the second clause of §1 be said to qualify or limit, or restrict the meaning of the words "uniform and equal" used in the first.

Under the act before the court, a lot or tract of land may be assessed for taxation at the rate of $1,400; while another lot or tract, in the same taxing district and of the same value, may be assessed for taxation at the rate of $700. The pretext for this violation of the rule of uniformity and equality of assessment, is that the second

lot is subject to the lien of a mortgage to the amount of $700 or more, while the first is unencumbered. The fallacy of this method becomes apparent when it is remembered that general taxes are assessed against property, and not against its owners. The tax follows the thing against which it is assessed, and does not constitute a debt against the owner. Its claim for revenue being paramount, the State has nothing to do with questions of title, liens or equities. Before the law, all property stands alike subject to taxation without regard to the title by which it is held, or the equities with which it is charged. A valid sale for delinquent taxes fuses all rights of ownership, extinguishes all equities, and transfers to the purchaser an unencumbered title in fee simple.

The entire legal title being in the owner of the lot or tract, and the value of the land for taxation being unaffected by the amount of liens upon it, the attempted regulation by which the valuation of the land is made to depend upon the accident of the existence of a mortgage lien, destroys the uniformity and equality of assessment required by the Constitution, and therefore cannot be upheld. The general doctrine upon this subject is clearly stated by Judge Cooley: "It is of the very essence of taxation that it be levied with equality and uniformity, and to this end there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it." Cooley's Const. Lim. (6th ed.) 608; 2 Kent 231; Bright *v.* McCulloch, 27 Ind., 223.

34 It is said in Cleveland etc. R. Co. *v.* Backus, 133 Ind. 513, 535: "The first clause of the section (§ 1 article 10, *supra*) is certainly complied with when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation; that is to say, there is uniformity and equality of assessment and taxation when all the property is to be assessed at its true cash value, and the same rate is fixed on all property subject to assessment for the tax."

And in Willis *v.* Crowder, 134 Ind. 515, the court say: "The taxable value of property is its fair cash value, a fair cash value being the market or selling price, and if there be no market value, then it is the actual value that rules."

The act of March 4, 1899, does not permit an assessment of the mortgaged real estate at its fair cash value, or at any value fixed by the judgment or discretion of the assessors, but it requires that arbitrary deductions shall be made of amounts fixed by the legislature, and which have no basis in, or connection with, the nature of the property assessed, or even with the encumbrances to which it is subject. Under this act, none of the property to which it relates can be assessed at its cash value, as other real estate is assessed.

The act does not attempt to divide the assessment for taxation between the mortgagor and the mortgagee, but stops short with the deduction allowed to the mortgagor or owner of the fee. It entirely relieves the mortgage interest from taxation if the mortgagee is a non-resident, or if the mortgage is a school fund mortgage.

But it is claimed that absolute uniformity and equality of assess-

ment can not be attained, and therefore the law must be satisfied with something less. The answer to this proposition is that the obstacles to uniformity and equality contemplated by the courts which have used this language are those which inhere in the nature of things, such as the fallibility of men's judgment as to values, the mistakes and omissions of public officers, and the frauds of owners. They are never such inequalities and differences as are created by the law itself. While the efforts of the law to produce absolute uniformity and equality may be ineffectual, the constitution demands that the taxing statutes shall aim at these objects, and that such statutes themselves shall be free from provis-
35 ions which destroy them.

2. The act of March 4, 1899, is a special law for the assessment and collection of taxes for State, county, township and road purposes, and therefore falls within the prohibition of § 22, article 4 of the constitution. The very title of the act indicates its special character. It is not general either as to the property exempted from assessment and taxation, or the persons who are the objects of its discriminating bounty. It is entitled, "An act concerning the taxation of real estate encumbered by mortgage." * * * It does not apply to real estate encumbered by liens, generally, but, without reason therefor, is confined, exclusively, to such real estate as is encumbered by a particular kind of lien. In this respect, it favors certain individuals and property, and discriminates against all others of the same class who are similarly situated. It cannot be defended on the ground that there are two separate estates in lands encumbered by mortgage, and that this fact constitutes a basis of classification. The law declares that for the purpose of taxation, the mortgagor shall be deemed the owner of real property until foreclosure and possession taken by the mortgagee. "In cases of mortgaged real estate, the mortgagor shall, for the purpose of taxation, be deemed the owner until the mortgagee shall have taken possession of the mortgaged premises, after which the mortgagee shall be deemed the owner." § 28 p. — Acts 1891, § 8438 Burns 1901.

It has been held repeatedly by this court that a mortgage conveys no estate in the lands mortgaged, but simply creates a lien. § 1099 Burns 1901; Reasoner *v.* Edmunson, 5 Ind. 393; Francis *v.* Porter, 7 Ind. 213; Norton *v.* Noble, 22 Ind. 160; Grable *v.* McCulloh, 27 Ind. 472; Fletcher *v.* Holmes, 32 Ind. 497.

This being so, what difference is there between the lien of a mortgage on lands and other liens? And why should real estate subject to one particular kind of lien be separated from other property also subject to liens of equal dignity, and relieved from equal burdens of taxation? The class to which the owner of the favored real estate belong is that of debtors and owners of real estate subject to liens. The class to which the property belongs is that of real estate encumbered by liens. Why should these classes be subdivided, and one subdivision favored, and the remaining members of those classes discriminated against? To

illustrate the practical operation of the statute, let it be
36 supposed that A, B, C, D, and E each, is the owner of a lot of the value of $1,400 on the same street, in the same block, in the same town. A's lot is subject to a mortgage lien of $700; B's to a vendor's lien of $700; C's to a mechanic's lien of $700; D's to a street improvement lien of $700; and E's to the lien of a judgment for $700. Can any reason, valid in law, be given why A should have the right to a deduction of $700 from the value of his lot, as the basis of assessment and taxation, but that B, C, D and E shall be denied that privilege? Why "the amount of such valuation, remaining after such reduction shall have been made, shall form the basis for assessment and taxation for said real estate," in A's case, but that the full amount of the valuation of the lots owned by B, C, D and E, without any deduction for the liens upon them, should form the basis of such assessment against them, it is impossible to discover.

But even as among the favored owners of real estate encumbered by mortgage liens, the classification is unequal and unjust. If A owns a lot valued for taxation at $1,400, encumbered by a mortgage lien of $700, he is allowed a deduction of $700. But if B owns a lot valued at $500 encumbered by a mortgage lien of $700, he is allowed a deduction of $250 only. Upon what natural or reasonable basis do these discriminations rest? Is not the statute "discriminative between individuals of the," so called, "class, and does it not select some for an exceptional burden?" Suppose, however, the reasons urged in support of the statute in question are valid; that as it applies to all persons belonging to a class into which all property owners of the State may at some time enter; and as it is not, in terms, limited to individuals of a class, it is therefore not in conflict with the constitution. All enactments having these qualifications, it is said, are to be regarded as within the limitations of the constitution. The owners of all real estate encumbered by mortgage constitute a natural class, and legislation applying to all of them is general and not special. It follows, that the owners of all real estate encumbered by vendors' liens constitute another class just as distinct and quite as natural; the owners of real estate encumbered by mechanics' liens, another; the owners of real estate encumbered by street improvement liens, another; and the owners of real estate encumbered by judgment liens, still another. Therefore, no objection could
37 be taken to a further act of the legislature declaring that the owners of real estate liable for taxation in the State of Indiana, being indebted in any sum secured by a vendor's lien upon real estate, may have the amount of such indebtedness, not exceeding $1,000, deducted from the assessed valuation of the encumbered premises for the year, and that the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for that year. Then, other separate acts fixing deductions of $1,500 for indebtedness secured by mechanics' liens; $250 for indebtedness secured by street improvement liens, and $100 for indebtedness

secured by judgment liens, must also be unobjectionable. Could such legislation be defended? If not, by what argument can a classification, which selects as the objects of its favoritism one set of debtors, and excludes all others, notwithstanding their situation, is, in every legal aspect, undistinguishable from that of the favored individuals, be saved from the condemnation under the Constitution?

The very just and sensible remarks of Dixon, C. J., in Knowlton *v.* Supervisors of Rock county, 9 Wis. 421, are entirely pertinent here: "It is contended in argument," say the court, "that as those provisions fixed by one uniform rate without the recorded plats, and another within them, thus taking all the property without alike, and all within alike, they do not infringe the Constitution. In other words, that, for the purpose of taxation, the legislature have the right arbitrarily to divide up and classify the property of the citizens, and, having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

"The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule on the subject. It is believed that, if the legislature can by classification thus arbitrarily, and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also by the same means discriminate between lands used for one purpose, and those used for another, such as those used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by
38 the description, such as odd-numbered lots and blocks, and even-numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use, or description, or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions, and locations of real and personal property. We do not see why the system may not be carried further, and the classification be made by the character, trade, profession, or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature 'You shall not discriminate between individuals or corporations; but you may divide the citizens up into different classes, as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class, and against the other, as much as

you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn sanction of a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore can not adopt it."

I have been unable to find a single decision, State or Federal, in which an arbitrary classification such as that created by the act of March 4, 1899, has been sustained. Neither is any decision of this character referred to in the prevailing opinion. On the other hand, the reported cases condemning such rules of assessment and taxation are numerous and emphatic.

"This is a domain from which special and local legislation is utterly excluded whenever the legislative end can be effected by a general law." Van Riper *v.* Pearson, 40 N. J. L. 1, 9.

"Interdicted local and special laws are all those that rest on a false or deficient classification. * * *." Van Riper *v.* Parsons, 40 N. J. L. 1.

"There must be substantial distinction, having reference to
39 the subject matter of the proposed legislation between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restrictions of the legislation." State *v.* Hammar, 42 N. J. L. 435, 440.

"Such law must embrace all, and exclude none, whose condition and wants render such legislation equally necessary or appropriate to them as a class." Randolph *v.* Wood, 49 N. J. L., 85.

"The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances." Lippman *v.* The People, 175 Ill., 101, 106.

"A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all." *Ex parte* Jentzsch, — Cal., —; 32 L. R. A., 664, 665.

"The conclusion is that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disability or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." Passadena *v.* Stimson, 91 Cal., 238.

"This classification, however, must be founded upon differences which are either defined by the Constitution, or natural, and which will suggest a reason which might rationally be held to justify the diversity in legislation." Darcy *v.* San Jose, 104 Cal., 642.

"While the classification was, in itself, arbitrary, as in this case, the law did not include all who came within the arbitrary classification thus made." *Ex parte* Jentzsch, — Cal., —; 32 L. R. A., 664, 665.

"Every one has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law, from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized by the law." * * *

"The State, it is to be presumed, has no favors to bestow,
40 and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be leaned against as probably not contemplated or designed." Cooley's Const. Lim. 393, 395. See also, Bank of the State, *v.* Cooper, 2 Yerg. 599; Officer *v.* Young, 5 Yerg. 320; Griffin *v.* Cunningham, 20 Grat. 31; Arnold *v.* Kelley, 5 W. Va. 446; Lewis *v.* Webb, 3 Greenl. 326; State *v.* Ellet, 47 O. St. 90, 21 Am. St. Rep. 772 and notes; State *v.* Hinman, 65 N. H. 103, 23 Am. St. Rep. 22 and notes; State *v.* Sheriff, 48 Minn. 236, 31 Am. St. Rep. 650; Hogg *v.* Mackay, 23 Ore. 339, 37 Am. St. Rep. 682; State *v.* Gardner, 58 Ohio St. 599, 65 Am. St. Rep. 785; Washington University *v.* Rouse, 8 Wal. 444.

The partial legislation of the act of March 4, 1899, is not sanctioned by anything said by this court in Florer, treas. *v.* Sheridan, adm., 137 Ind. 28. The statute which was held constitutional in that case permitted every debtor in the State to deduct the amount of his debts from the sum of his credits, the excess of the latter only being subject to assessment and taxation. Whatever may be said of that statute in other respects, the classification of the persons who might avail themselves of it was general, and in striking contrast with that of the act before us.

3. The privilege of the deductions authorized by the act of March 4, 1899, is confined to a particular class of debtors, and does not, upon the same terms, equally belong to all the citizens of the State. The privilege granted is that of a special mode of assessment which admits of a reduction of the valuation of real estate for the purposes of taxation. The terms upon which this privilege may be claimed are such that only a very limited class of debtors comes within them. The great body of the citizens of the State are by those terms excluded from the benefit of the privilege secured to the few. All who are not indebted at all, and who own land, must be assessed upon the full valuation of that land. All land owners who are indebted, but whose debts are not secured by mortgage on their lands, are excluded. All who are indebted, and whose lands are encumbered by liens, other than mortgage liens, are shut out. All citizens who own no real estate, but who hold mortgaged goods and chattels, are denied the privilege. The law which grants the privilege to the few, denies it to all others, as certainly as if it
41 declared, in so many words, that they should not enjoy it. And just in proportion as the terms on which such privileges are granted are made special and individual, the number of citizens who come within them is reduced. The vice of this statute, as has been pointed out elsewhere in this opinion, is in the classification.

It attempts to create a class within a class. The terms upon which the privilege is granted are too narrow. It is not sufficient that any citizen of the State may, possibly, at some time, fall within the description of the favored class. If this were so, classifications might be made which would not include a score of citizens in the State.

4. The practical effect of the act is to *exempt* from taxation property not used for municipal, educational, literary, scientific, religious, or charitable purposes, and for this reason it conflicts with § 1, article 10 of the constitution, and is void. The constitutional rule requires that *all* property, real and personal, shall be valued for taxation, except such only for the purposes above named, as may be especially exempted by law. It seems clear that if $700 may be deducted from the assessed valuation of each lot or tract of land in the State, which is encumbered by mortgage, that proportion of the value of each lot or tract is exempted from its due share of the common burden. Calling it a *deduction* does not make it any the less an exemption. If two lots are valued at $1,400 each, one being encumbered with a mortgage for $700, and the other not, and the owner of the first is required to pay taxes on a valuation of $700 only, and the owner of the second on $1,400, then the first lot, by reason of the encumbrance, is exempted from taxation to the extent of $700. Call it what you may, the owner of the first lot enjoys an immunity which is denied to his less fortunate neighbors. He is exempted from a burden, to which all others are subject. "The constitution absolutely prohibits the exemption of any property, except for municipal, educational, literary, scientific, religious, or charitable purposes, and as no part of plaintiff's property is included within any of these enumerated classes, any law which attempts to exempt it from taxation is void. And 'any law which indirectly produces such exemption must be equally void; that can not be accomplished indirectly which the organic law declares shall not be done directly;' Mr. Justice Field, in Huntington *v.* Worthen, 120 U. S. 97."

42 It is said in the brief of counsel for the appellant that "the deductions on account of mortgage indebtedness for the year 1900 aggregated over $35,000,000. The amount claimed for the year 1901 will approximate $40,000,000." For every dollar of valuation of real estate so withdrawn from assessment, the burden of taxation on what is left is increased by just so much. Every reduction of the aggregate assessment requires a proportionate increase in the rate of taxation. A law which works such stupendous and disastrous results to the great body of the taxpayers of the State should rest on solid and substantial foundations if it is to be sustained. Believing as I firmly do, that the act of March 4, 1899, is vicious and indefeasible in principle, and that its application is destructive of uniformity and equality in taxation, I think that it should be declared unconstitutional, and that the judgment of the Marion circuit court should be affirmed.

In addition to all that has been said, it may be added, that the act in question equally conflicts with the fourteenth amendment to

the Constitution of the United States, in that it denies to a large part of the citizens of this State, the protection it extends to a selected class.

Monks, J., concurs in dissenting opinion.

43 *Overruling of Petition for Rehearing.*

And afterwards to wit: on the 22nd day of May, 1902, the court being sufficiently advised in the premises overrules the petition for a rehearing heretofore filed by the appellee, with an opinion pronounced by Gillett, J., as follows:

Opinion on Motion for Rehearing.

Appellee's counsel have filed a petition for a rehearing in this cause, and we have given careful consideration to the views that find expression in their brief in support of such petition. After doing so, and upon a re-examination of, and further search for authorities, we adhere to the conclusion before announced, that the law is valid. The original opinion stated at length the views of a majority of the court, but the importance of the case is a sufficient reason for a further opinion.

It must not be forgotten that section one of article ten of the State constitution is not the source of the legislative power of taxation, for that section is only a curb upon the authority of the General Assembly. Can it be said that a law that authorizes a deduction of mortgage debts from the value of the tracts of real estate to which they respectively attach provides for an unequal assessment or that it is a regulation that prevents a just valuation of all property not authorized to be exempted by the constitution? It is true that the General Assembly has not power to fix a valuation upon real estate, but this act is based upon a recognition of the fact, that we have already shown upon the authorities, both Federal and State, that he who makes a mortgage upon his real estate does an act that amounts to a conditional alienation of his title, and it is, of course, unquestionable that he thereby parts with a substantial part of his land value. Counsel for appellee may assert that a mortgage is a mere lien, and for most purposes we so recognize it, but if it be the law, and it does not admit of question that it is, that the mortgage will be treated as a conveyance of title whenever necessary to protect the rights of the parties, the question arises whether the General Assembly cannot seize upon this fact to avoid double taxation? As pointed out in our former opinion, the Supreme Court of the United States has declared that a mortgage may be treated as a conveyance of the land *pro tanto*, so that, with statutory authority, a non-resident mortgagee may be compelled to pay a ratable part of the assessment upon the land, at the *situs* thereof. If it be asked, how do we justify the omission to place lands encumbered by vendor's liens,
44 mechanic's liens or judgment liens upon the same footing as lands subject to mortgage, we answer that such former de-

mands are mere liens, while in the case of a mortgage the mortgagor has by deed, in no insubstantial sense, parted with a part of his interest in the land. Is this not reason enough to justify the General Assembly in recognizing this as ground for distinction, when to do so would be, in its judgment, to accomplish justice? This court in the Florer case, held that debts could be deducted from credits, because the constitutional mandates as to equality in the assessment and as to a just valuation of all property not authorized to be exempted by the constitution had no reference to mere fictitious values, and this case stands upon the same general footing, but it finds stronger support in reason, in that there is a separation of values by defeasible deed. Within a year after the taking effect of the present State constitution the General Assembly passed an act concerning taxation which contained, in section twenty-three thereof, the following words: "Provided, that each tax payer may and is hereby authorized to deduct the amount of his indebtedness out of his solvent claims." Acts special session 1852, p. 44. The force of a construction of the constitution by a session of the General Assembly that had in its personnel a considerable number of the members of the constitutional convention is forcefully pointed out in City of Indianapolis *v.* Navin, 151 Ind., 139. The validity of such enactments as the one last mentioned has been a number of times assumed by this court before the decision in the Florer case. Matter *v.* Campbell, 71 Ind., 512; Wasson *v.* First Nat. Ban-, 107 Ind., 206; City of Indianapolis *v.* Vajen, 111 Ind., 240; Moore *v.* Hewitt, 147 Ind., 464. In the Florer case the question was directly in judgment, and we must overrule that decision if we depart from our previous ruling in this case, that the taxation law of 1899 is valid.

We will now call attention to a few authorities on the subject of mortgage deductions not cited in our previous opinion. The legislature of Oregon passed a law which provided for a taxation of real estate mortgages at the *situs* of the land, and authorized the deduction of the amount of such mortgages from the tracts of real estate to which they respectively attached. The constitution of Oregon upon the subject of taxation is in every material particular a precise counterpart of our constitutional provision on the subject, yet it was held in Crawford *v.*
45 Linn Co., 11 Ore. 482, upon a full consideration of the question, that the statute was valid. The statute referred to is the same one that the Supreme Court of the United States, in Savings and Loan Society *v.* Multnomah Co., 169 U. S. 421, held did not deny the equal protection of the laws. The case of State *v.* Runyon, 41 N. J. L. 98, is to a considerable extent in point. In the year 1876 the legislature of New Jersey enacted a statute that provided that mortgages upon real estate should not be taxed unless the mortgagor made a claim for a deduction on such account. In that event, even if the claim was allowed by the assessor, the mortgage was taxed at the *situs* of the land. In passing upon the validity of that law, the court, in the case cited, speaking by Depue, J., said: "Independent of constitutional restrictions and prohibitions,

the legislature is the sole judge of the propriety of taxation. It may select and define the sources from which the public revenue shall be derived, and prescribe the means by which taxes shall be laid, levied and collected. Perfect equality in taxation is a good that is unattainable, and will be so long as the instruments of government are imperfect. The framers of the constitutional amendments did not aim at the impossible. They contented themselves with the accomplishment of so much of good as was attainable under the single requirement that 'property shall be assessed for taxes under general laws and by uniform rules, according to its true value.' In other respects, the legislative power over taxation was left unimpaired. If property be such in its nature as, upon ordinary principles of taxation, to be capable of having a two-fold *situs* for taxation, the legislature may select either as the place where the tax should be laid. Chattels considered under the legal classification of personalty, follow the person of the owner, and yet chattels may be so localized in use as to be taxable at the place where they are situate, as against the owner who resides elsewhere within the State. State *v.* Falkinburge, 3 Green 320. A mortgage possesses the same dual characteristics. The debt of which the bond is the representative is a chose in action which has no locality, and will follow the residence of the owner. The mortgage, as security for the debt, is a conveyance of a qualified interest in the mortgaged premises, and creates an estate in lands. * * * The legislature may, I think, select, as the *situs* of taxation of mortgages, either the political division where the owner resides, or that in which the mort-
46 gaged premises are situate." It must be admitted, of course, that the constitution of New Jersey does not require all property to be taxed, but the point in the case lies in the fact that it recognizes the right of the legislature, when it determines to tax lands, to permit mortgage values to be deducted therefrom, notwithstanding the requirement that property is to be assessed at its "true value."

We are not led to doubt whether the conclusion we have reached is right because under former legislation taxes have not been treated as debts which the owner was bound to pay. As before shown, they may be so treated, and we must regard the statute as a legislative recognition of the fact that substantially speaking the burden is upon the owner. Nor can we accept the view that the enactment in question is sporadic, and therefore to be treated as a legislative misfit in our system of taxation. In Lutz *v.* City of Crawfordsville, 109 Ind. 466, 468, the court said of the construction of statutes enacted at different times, but upon the same subject matter: "If the legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts, and uniform in its operation. It would violate all rules of logic, as well as settled principles of law, to dissect the system into parts and assign effect to each part irrespective of its effect upon the uniformity and consistency of the entire system. Statutes are to be construed as a part of a uniform system, and such a scheme

adopted as will give each part its appropriate place, and not destroy uniformity and harmony by cutting the system into disjointed and incongruous parts."

The authorities are against appellee on the subject of classification. In addition to the authorities cited in the principal opinion, we cite Edwards *v.* The People, 88 Ill. 340, 347, and People *v.* Barker, 155 N. Y. 330, 332. In the former case the supreme court of Illinois said: "It is also objected that the revenue law is unconstitutional, because the method of assessing is not uniform. The fact that certain credits and deductions may be allowed in the assessment of personal property, does not establish a want of uniformity. Where a law operates alike upon all persons and property like situated, it may be regarded as uniform. This, as we understand our revenue law, is its practical operation. Perfect equality of taxation
47 is a problem of difficult solution." In the New York case the court of appeals reached the same conclusion, but upon a somewhat different course of reasoning. The court said: "The right to have debts deducted from the value of taxable property is not an absolute one but in the nature of a favor. The State may grant or withhold it at pleasure. It was in the power of the State to tax all the property the relator had without providing for any deduction on account of debts. It cannot therefore be said that a law which permits the deductions as to certain debts and forbids it as to other debts, violates any constitutional provision."

On the subject of classification it is not difficult to accumulate extreme statements made by courts in the condemnation of statutes that so offend, but it materially conduces to a more intelligent understanding of the effect of such decisions if such statements are read in connection with the enactments they condemn. But if we may venture to attempt to extract the cardinal principle from the many discordant opinions upon the subject of classification, we may say that it will be found that what they condemn is a classification that is arbitrary, because it is not founded on differences recognized by the Constitution or naturally inhering in the subject-matter of the legislation to an extent that would at least suggest some reason why the law making power, acting in a presumed spirit of fairness, should have made the distinction. As stated before, we perceive in the statute under consideration a substantial reason for distinguishing between mortgages or defeasible sales and mere liens. And there is also a substantial reason for not permitting such deductions from personal property, since it is a fact, so well known as to be judicially recognized, that real estate bears more than its proportion of the burdens imposed by the State government.

The provision that not more than one half of the assessed value of the property shall be allowed as a deduction is not arbitrary, although some mortgagors may gain a greater benefit from the law than others. There is a basis in reason for such requirement, in that a wise public policy is conserved by an enactment that even if it releases a property owner from a part of the burden of taxation — still leaves him some portion of such burden, because his vote or influ-

ence is by that consideration likely to be cast on the side of holding public officers to due economy in the administration of public affairs.

In Cooley on Taxation, p. 170, it is said: "Even within the
48 class taxed, however, there may be rules of distinction; and these are perfectly admissible, provided they are general rules and are observed."

While the fact that the result of the upholding of this law may be to take millions of dollars worth of property from the State's assessment sheet has caused us to consider this case with great care, yet we cannot strike down the law for that reason. The question is political in its character, and, if the act is inimical to the interests of the State, the argument mentioned should be addressed to the General Assembly.

The petition for a rehearing is overruled.

All concur, except Dowling and Monks, J. J., who dissent.

49 *Certificate.*

It is therefore considered by the court that the judgment of the court below in the above entitled cause, be in all things reversed at the cost of the appellee all of which is ordered to be certified to said court.

And it is further considered by the court, that the appellant recover of the appellee the sum of $36.60 for their costs and charges in this behalf expended.

THE STATE OF INDIANA, }
Supreme Court. }

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said court in the above entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said court, at the city of Indianapolis, this 23rd day of May, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

R. A. BROWN, *C. S. C.*

50 And afterwards, to-wit: on the 31st day of May, 1902, being the 24th judicial day of said May term of this court before the same hon. judge, the following proceedings were had herein, viz:

"Come the parties, and the defendant now files his return to the alternative writ of mandate herein in two paragraphs, and on motion, the plaintiff is ruled by the court to reply. Said return is in these words and figures, viz:

Return to Alternative Writ.

51 Part 1. Return to alternative writ.

STATE OF INDIANA, *Marion County,* } *ss:*

In the Circuit Court, May Term, 1902.

STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis
vs.
HARRY B. SMITH, Auditor of Marion County. } No. 10986.

Return to Alternative Writ of Mandate.

Par. I. The defendant, Harry B. Smith, auditor of Marion county, in the State of Indiana, for return to the alternative writ herein, alleges that the complaint and alternative writ herein asks from the court an order to compel this defendant as auditor, to allow to the relator the exemptions therein claimed and set out, under and by virtue of the provisions of an act of the General Assembly of the State of Indiana, entitled: "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency," which became the law, without the governor's signature, March 4, 1899, which said act is in the words and figures following, to-wit:

52 SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

SEC. 2. Any person desiring to avail himself, or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

SEC. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of such mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

SEC. 4. Any person who shall willfully make a false statement of the facts provided for in section 2 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty, nor more than five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

SEC. 5. Whereas, an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.

But this defendant says that said act is wholly unconstitutional and void, in the following particulars, to-wit:—

1. That the said act is in violation of section 23, article 1 of the bill of rights of the constitution of the State of Indiana, which provides that: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" in that the said act does grant privileges and immunities to citizens, and classes of citizens, which, upon the same terms, are not granted to all citizens.

2. That the said act is in violation of section 22, article 4, of the constitution of the State of Indiana, which prohibits the General Assembly of the State of Indiana from passing local or special laws,

* * *, for the assessment and collection of taxes for State,

53 county, township or road purposes, in that the said law is a special law for the collection of taxes for State, county and township purposes.

3. That the said act is in violation of section 23, article 4, of the constitution of the State of Indiana, which prohibits special laws in all cases where a general law can be made applicable, and provides that "all laws shall be general, and of uniform operation throughout the State," in that the said act is not a general law, and a law of uniform operation throughout the State, where a general law could be made applicable, but, on the contrary, is special and discriminating, and creates classes, and relieves and exempts individuals unequally, and without ratio, from taxation.

4. That the said act is in violation of section 1, article 10, of the constitution of the State of Indiana, which provides that "the General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for the taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law;" in that the said act, by its provisions, exempts from taxation property not used or held for municipal,

educational, literary, scientific, religious or charitable purposes; and in that said act provides for an assessment, taxation and valuation of property which is not uniform and equal, and which is without ratio; and in that said act does not prescribe such regulations as to secure a just valuation for taxation for all property, both real and personal, as provided by the said constitutional provision.

Wherefore the defendant says that said writ should not issue, and that the relator is not entitled to the order and relief sought, and prays judgment for costs.

54 *Part 2. Return to Alternative Writ.*

Par. II. The defendant, Harry B. Smith, auditor of Marion county, in the State of Indiana, for a second and further paragraph of return to the alternative writ herein, alleges that the complaint and alternative writ herein asks from the court an order to compel this defendant, as auditor, to allow to the relator the exemptions therein claimed and set out, under and by virtue of the provisions of an act of the General Assembly of the State of Indiana, entitled: "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency," which became the law, without the governor's signature, March 4, 1899, which said act is in the words and figures following, to-wit:—

55 SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year. Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

SEC. 2. Any person desiring to avail himself, or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or *bona fide* owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

SEC. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall

immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or *bona fide* holder or owner of such mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

SEC. 4. Any person who shall willfully make a false statement of the facts provided for in section 2 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty, nor more than five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

SEC. 5. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.

But this defendant says that said act is wholly unconstitutional and void, and in violation of the fourteenth amendment of the Constitution of the United States, which provides that

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens *on* the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;"

in this, that said act and law does abridge the privileges and immunities of citizens, and discriminates between citizens of the United States, and of the State of Indiana, by granting privileges, immunities and exemptions to one person, or class of persons, not enjoyed by all persons equally and alike; and deprives certain ones of the citizens and persons of said State of their property without due process of law; and denies to certain persons and citizens of the
56 United States, and of the State of Indiana, the equal protection of the law by compelling the said persons to pay and bear an inequitable, unjust and unequal part and portion of the taxes levied for State, county, township and road purposes; all in violation of the provisions of the said fourteenth amendment to the Constitution of the United States in such case made and provided, in this:

That the State of Indiana has large educational and school funds, amounting in gross to about fifteen millions of dollars, ($15,000,000.00); that about three millions of dollars ($3,000,000.00) of said funds are under the custody and control of this defendant, as auditor of Marion county, State of Indiana. That said funds are required, by law, to be loaned and invested by this defendant and other county auditors of the State of Indiana, and the interest only thereon is used in maintaining the common schools of the said State, and the principal is required to be ever kept intact and maintained unimpaired; and the loans from said funds are required by law to

be secured by mortgage upon real estate, not exceeding two thousand dollars ($2,000.00) in any one loan.

That such funds are not taxable, by law, being educational funds belonging to the State to be loaned, as aforesaid, and no provision is made by said law exempting loans made from said funds from the operation of said act of March 4, 1899, aforesaid.

That said law, while it deducts and excepts the mortgage indebtedness of the owner from taxation, has no provision therein requiring the amount exempted to be taxed or charged to the lists of any other person.

That large sums of money are loaned in Indiana, and in Marion county of said State, by corporations, insurance companies and others, who are non-residents of said State, and whose funds are not taxable therein, and said law has no provision excepting from the operation thereof mortgages held by non-residents, and not taxable in the State of Indiana.

That the State of Indiana, and Marion county in said State, has a great number of institutions and association-, such as cemetery associations, literary institutions, colleges, and other institutions of literary, charitable, municipal, educational and religious character, all of which have, hold, own and loan their funds, and secure the same by mortgage upon real estate, all of which institutions, and
57 their funds, are exempt from taxation by the constitution of said State, and against which said institutions the deductions made from the lists of other persons cannot be taxed, by reason of their right of exemption from taxation, and said act has no provision excepting therefrom the mortgages belonging to such institutions and persons.

That by reason of the facts stated, enormous amounts of property escape from and are exempted from taxation by the operation of said law. That thereby, all persons owning real estate unincumbered by mortgage, and the owners of all other kinds of taxable property, are compelled and required to submit to and pay a larger proportion and amount of taxes, to make up the deficit and the amount necessary to meet the public obligations, than is their just, equal and proportionate share, by the operation and provisions of said act.

That section 1, article 10, of the constitution of the State of Indiana is as follows:

"Assessment and taxation.—1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law."

That section 1 of the above quoted act of March 4, 1899, provides, as hereinbefore set out, that there shall be "deducted from the assessed valuation of mortgage premises for that year," the amount of the exemption and deduction allowed and provided for by said

law, and it is provided, by the terms of said section of said act, that "the amount of such valuation remaining after deduction shall have been made, shall form the basis for assessment and taxation for said real estate for said year," thereby making two bases for the taxation of real estate, differing in character and ratio, contrary to the said constitutional provision of section 1, article 10, of the constitution of the State of Indiana, hereinbefore set forth.

Wherefore defendant says said writ should not issue; that the relator is not entitled to the order and relief sought, and prays judgment for costs.

HAWKINS AND SMITH,
Att'ys for Def't.

58 And afterwards, to-wit: on the 5th day of June, 1902, being the 4th judicial day of the June term aforesaid of this court, the following proceeding was had herein, viz:

"Come the parties and the plaintiff now files a demurrer to the return of the defendant to the alternative writ of mandate herein in these words, viz:"

Demurrer to Return.

"STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Circuit Court, May Term, 1902.

STATE OF INDIANA on the Relation of Martha Lewis and Benjamin Lewis	No. 10986. Demurrer to Return to Alternative Writ.
v.	
HARRY B. SMITH, Auditor of Marion County.	

Come now the plaintiffs in the above entitled cause, and demurs separately and severally to each of the first and second paragraphs of the return to the alternative writ of mandate of said defendant Harry B. Smith, auditor of Marion county, for the reason that neither of them state facts sufficient to constitute a sufficient return or answer to the alternative writ of mandate.

WM. B. SCHWARTZ,
Att'y for Plaintiff."

And afterwards, to-wit: on the 6th day of June, 1902, being the 5th judicial day of the said June term aforesaid, of this court,
59 before the same hon. judge, the following proceedings were had herein, viz:

Demurrer Sustained.

"And now on this 6th day of June, 1902, comes the plaintiff by William B. Schwartz, its attorney, and comes the defendant by Hawkins and Smith his attorneys, and the court sustains the demurrer of the plaintiff to each paragraph of the return of the defendant herein, to which ruling the defendant at the time excepted.

And now the defendant is ruled to make further return, and being so ordered, elects to stand by his return as made, and declines to make further return, or answer further, and now, thereupon, the court finds for the relators, and that they are entitled to the relief prayed in their complaint.

Judgment.

It is therefore ordered, adjudged and decreed by the court that a peremptory writ of mandate issue out of and under the hand of this court, to the defendant Harry B. Smith, auditor of Marion county, Indiana, commanding him to forthwith allow the exemption prayed for by the relators in the complaint herein, and to deduct from the assessed valuation of the real estate described in the complaint, the amount of the mortgage thereon shown, to-wit: five hundred dollars, ($500.00), and to make the amount of such valuation of said real estate remaining after said deduction shall have been made, form the basis for assessment and taxation for said real estate in the complaint described, for the year 1900.

And the relators herein shall have and recover from the defendant their costs, taxed at — dollars ($—), to all of which rulings, order and judgment of the court, the defendant at the time excepted.

Appeal Prayed.

And the defendant now prays an appeal to the supreme court of Indiana, which is granted upon the filing by the defendant of his appeal bond herein in the sum of two hundred dollars
60 ($200.00) within ninety (90) days to the approval of the court.

Bond Filed.

And now comes the defendant Harry B. Smith, auditor of Marion county, Indiana, and files his appeal bond herein, in the sum of two hundred dollars ($200.00), which bond is now approved by the court and is in these words and figures, viz:

61 *Bond.*

Appeal bond, supreme court.

Know all men by these presents, that we Harry B. Smith, auditor of Marion county, as principal and Fred K. Shephard, as surety are held and firmly bound unto Martha Lewis and Benjamin Lewis as relators, in the penal sum of two hundred dollars, to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 6th day of June, 1902.

The condition of the above obligation is such, that whereas, heretofore, to wit: on the 6th day of June, 1902, the said Martha Lewis and Benjamin Lewis as relators in the Marion circuit court, recovered a judgment against the said Harry B. Smith, auditor of Marion county for a peremptory writ of mandate for the sum of — dollars, in damages and costs of suit, etc.; from which said judgment of said Marion circuit court, the said Harry B. Smith, auditor of Marion county prayed appeal to the supreme court of Indiana.

Now if the said Harry B. Smith, auditor of Marion Co. shall well and truly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against him, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

HARRY B. SMITH. [SEAL.]
FRED K. SHEPARD. [SEAL.]
—— ——. [SEAL.]

Approved June 6th, 1902.

HENRY CLAY ALLEN, *Judge.*

[Endorsed:] No. 10986 State of Indiana *ex rel.* Martha J. Lewis *vs.* Harry B. Smith Appeal bond Amount, $200.00 Filed June 6 1902 Geo. B. Elliott, clerk. —— —— attorney.

62 *Clerk's Certificate.*

STATE OF INDIANA, } *ss:*
Marion County, }

I, George B. Elliott, clerk of the circuit court within and for the county aforesaid, do hereby certify that the foregoing transcript contains full, true and complete copies of all the entries of proceedings had and of all papers filed in said court in cause numbered 10,986, as appear from the records and files thereof, now in my custody.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Marion circuit court, at my office in the [SEAL.] city of Indianapolis, this 17th day of June, 1902.

GEO. B. ELLIOTT, *Clerk.*

63 *Assignment of Errors.*

In the Supreme Court of Indiana.

HARRY B. SMITH, Auditor of Marion County, Indiana, Appellant,
v.
STATE OF INDIANA on the Relation of Martha Lewis and Benjamin Lewis, Appellee.

Filed Jun- 18, 1902. R. A. Brown, Clerk.

The appellant, Harry B. Smith, auditor of Marion county, Indiana, avers that there is manifest error in the proceedings and judgment in said cause in this:

First. The court erred in overruling the demurrer of the appellant to the complaint, affidavit and alternative writ constituting the complaint herein.

Second. The court erred in sustaining the demurrer of the appellee to the first paragraph of appellant's return and answer to the alternative writ and complaint herein.

Third. The court erred in sustaining the demurrer of appellee to the second paragraph of appellant's return and answer to the alternative writ and complaint herein.

Wherefore the appellant prays that the judgment herein be reversed.

HAWKINS & SMITH,
Attorneys for Appellant.

64 *Joinder in Error.*

The State of Indiana on the relation of Martha Lewis and Benjamin Lewis, appellee herein, says that there is no error in the proceedings or judgment in the above entitled cause.

WILLIAM L. TAYLOR,
Attorney Gen'l of Indiana, and
WM. B. SCHWARTZ,
Attorney- for Appellee.

Filed Jun- 18 1902
R. A. BROWN, *Clerk.*

65 And afterwards, to-wit: on the 18th day of June, 1902, the same being the 21st judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by their counsel, and file their joint petition to use the same briefs filed in No. 19,752, heretofore decided in this court, which petition is in the words and figures following: (Here insert.)

And on the same day the following further pleas and proceedings were had in said court, in said cause, to-wit:

Come now the parties, by their counsel, and file their joint motion to advance, which motion is in the words and figures following: (Here insert.)

And on the same day the following further pleas and proceedings were had in said court, in said cause:

Come now the parties, by their counsel, and the court being sufficiently advised in the premises, grants said petition to use the same briefs filed in No. 19,752.

And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files his brief (8) in the words and figures following: (Here insert.)

66 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellee, by counsel, and files its brief (8) in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 19th day of June, 1902, the same being the 22d judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, orders that said cause be advanced and submitted for decision.

And on the same day the following further pleas and proceedings were had in said court in said cause:

Comes now the appellee, by counsel, and files its petition for certiorari, together with a waiver of notice; which petition and waiver of notice are in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 20th day of June, 1902, the same being the 23rd judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, overrules appellee's motion for certiorari, heretofore filed.

67 And afterwards, to-wit: on the 27th day of June, 1902, the same being the 29th judicial day of the May term, 1902, of said supreme court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, now affirms the decision and judgment of the court below in the above entitled cause, with an opinion pronounced by Gillett, J., in the words and figures following:

This is the second appeal of this cause. Upon the first appeal, decided at the November term, 1901, under the title, State, *ex rel.* Lewis, *et al. v.* Smith, auditor, the essential questions on this appeal were determined against the appellant herein. On the authority of the decision rendered in said former appeal, the judgment of the court below, from which this appeal is prosecuted, is affirmed.

Dowling, C. J. and Monks, J., dissent.

68 And afterwards, to-wit: on the 30th day of June, 1902, being the 31st judicial day of the May term 1902, of said supreme court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the clerk of the supreme court, his petition for the allowance of a writ of error, said petition being hereto next below attached, and being as follows:

69 STATE OF INDIANA:

In the Supreme Court.

HARRY B. SMITH, Auditor of Marion County, Indiana, Appellant,
vs.
STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis, Appellees. } No. 19901.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the supreme court of the State of Indiana, in rendering judgment against him, in the above entitled cause, the appellant, Harry B. Smith, auditor of Marion county, Indiana, hereby prays a writ of error from the said decision and judgment of the supreme court of the State of Indiana to the Supreme Court of the United States.

Assignment of errors is filed herewith.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
Att'ys for Appellant.

STATE OF INDIANA, } ss:
In the Supreme Court, }

Let the writ of error issue upon the execution of a bond by Harry B. Smith, auditor of Marion county, Indiana, appellant, to the State of Indiana on the relation of Martha Lewis and Benjamin Lewis, in the sum of five hundred dollars, ($500.00); said bond when approved to act as a supersedeas.

Dated June 30, 1902.

ALEXANDER DOWLING,
Chief Justice of the Supreme Court of the State of Indiana.

70 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files a writ of error from the Supreme Court of the United States, to the said supreme court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

71 UNITED STATES OF AMERICA:

The President of the United States of America to the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court of Indiana, before you, at the June sitting of the May term, 1902, thereof, between Harry B. Smith, auditor of Marion county, Indiana, appellant, *vs.* State of Indiana on the relation of Martha Lewis and Benjamin Lewis, a manifest error has happened, to the great damage of the said appellant, Harry B. Smith, auditor of Marion county, Indiana, as by his complaint appears; we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, this June 30, 1902.

Done in the city of Indianapolis, with the seal of the circuit court of the United States for the district of Indiana attached.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk Circuit Court United States, District of Indiana.

Allowed.
ALEXANDER DOWLING,
Chief Justice of the Supreme Court of the State of Indiana.

72 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files his bond on appeal to the Supreme Court of the United States, in the penal sum of five

hundred ($500) dollars, which bond is now taken and approved, being hereto next below attached, and being as follows:

73 STATE OF INDIANA:

In the Supreme Court.

HARRY B. SMITH, Auditor of Marion County, Indiana, Plaintiff in Error,
vs.
STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis, Defendant in Error.
} No. 19901. Bond.

Know all men by these presents, that we, Harry B. Smith, auditor of Marion county, Indiana, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the State of Indiana, for the benefit of Martha Lewis and Benjamin Lewis, relators in the above entitled cause, defendant in error, in the sum of five hundred dollars, to be paid to the said defendant in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of June, 1902.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the supreme court of the State of Indiana:

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

HARRY B. SMITH, [SEAL.]
Auditor Marion Co., Ind.

[Seal American Surety Company, New York.]

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By HORACE E. SMITH, *Resident Vice President.*

Attest: ERNEST V. CLARK, *Resident Assistant Secretary.*

The above bond is approved.
ALEXANDER DOWLING,
Chief Justice of the State of Indiana.

74 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files his citation on said writ of error, duly signed by Hon. Alexander Dowling, chief justice of this court, and proof of service of the citation on the attorney for the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

75 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the State of Indiana on the relation of Martha Lewis and Benjamin Lewis, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Indiana, wherein Harry B. Smith, auditor of Marion county, Indiana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Indiana, this 30 day of June, 1902.

ALEXANDER DOWLING,
Chief Justice of the Supreme Court of the State of Indiana.

Attest:
ROBERT A. BROWN,
Clerk of the Supreme Court of the State of Indiana.

INDIANAPOLIS, INDIANA, *June* 30, 1902.

I, William L. Taylor, attorney-general of the State of Indiana, and attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

WILLIAM L. TAYLOR,
Attorney-General and Attorney for the State of Indiana and the Relators herein.

76 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Comes now the appellant, by counsel, and files an assignment of errors in the Supreme Court of the United States, on a writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

77 UNITED STATES OF AMERICA:

In the Supreme Court.

HARRY B. SMITH, Auditor of Marion County, Indiana, Appellant,
vs.
STATE OF INDIANA on the Relation of MARTHA LEWIS and Benjamin Lewis, Appellees. } No. 19901.

Assignment of Errors.

Comes now Harry B. Smith, auditor of Marion county, Indiana, appellant in the above entitled cause, and files herewith his petition for a writ of error, and shows that there is manifest error in the records, proceedings and judgment of the court in the above entitled cause, and, for the purpose of having the same reviewed by the Supreme Court of the United States, makes the following assignment:

The supreme court of the State of Indiana erred in holding and deciding that the act of the General Assembly of the State of Indiana, passed March 4, 1899, which became a law without the signature of the governor, entitled, "An act concerning the taxation of real estate encumbered by mortgage, and declaring an emergency," and particularly, sections one, two and three thereof, were constitutional and valid. The validity of said act, and said sections, was denied and drawn in question by the appellant herein, on the ground of their being repugnant to the fourteenth amendment to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The supreme court of the State of Indiana erred in holding and deciding:—

First. That the demurrer to the alternative writ, which was sustained by the circuit court of Marion county, Indiana, was
78 properly and correctly sustained, whereby it was decided that the said act of March 4, 1899, was constitutional and valid, and did not abridge the rights, privileges and immunities of citizens, and particularly of this appellant, and did not deprive the appellant of the equal protection of the laws, all as guaranteed by the fourteenth amendment to the Federal Constitution.

Second. That the demurrer to the second paragraph of return of the appellant herein to the alternative writ, which was sustained by the circuit court of Marion county, Indiana, was properly and correctly sustained, whereby it was decided that the said act of March 4, 1899, was constitutional and valid, and did not abridge the rights, privileges and immunities of citizens, and particularly of this appellant, and did not deprive the appellant of the equal protection of the

laws, all as guaranteed by the fourteenth amendment to the Federal Constitution.

For which errors the appellant, Harry B. Smith, auditor of Marion county, Indiana, prays that the judgment of the said supreme court of the State of Indiana, dated June 30, 1902, be reversed, and a judgment entered for the appellant, Harry B. Smith, auditor for Marion county, Indiana, for costs.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
Att'ys for Appellant, Harry B. Smith, Auditor of Marion County, Indiana.

79 STATE OF INDIANA:

In the Supreme Court.

I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record and proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the supreme court of Indiana, in the above entitled cause; also the original petition for the allowance of a writ of error, and the original writ of error from the Supreme Court of the United States to the supreme court of Indiana, with the allowance thereof, in this cause; the original citation to the defendant in error and proof of service thereof; the original assignment of errors in the Supreme Court of the United States on said writ of error, and a copy of the original bond and its approval.

Which said transcript, annexed hereto, together with said original petition for the allowance of a writ of error, said original writ of error, original citation, original assignment of errors, and copy of the original bond, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at the city of Indianapolis, this 30th day of June, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROBERT A. BROWN,
Clerk Supreme Court of Indiana.

80 *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Supreme Court of Indiana, }

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city of Indianapolis, Indiana, this 30 day of June, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROBERT A. BROWN,
Clerk of the Supreme Court of the State of Indiana.

Plaintiff's costs, —
Defendant's costs, —
Costs of transcript, —

____ ____,
Clerk of the Supreme Court of the State of Indiana.

Endorsed on cover: File No. 18,600. Indiana supreme court. Term No. 81. Harry B. Smith, auditor of Marion county, Indiana, plaintiff in error, vs. The State of Indiana on the relation of Martha Lewis and Benjamin Lewis. Filed July 5th, 1902.

FILE COPY. 8735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 81.

Office Supreme Court U.S.
FILED
OCT 12 1903
JAMES H. McKENNEY,
Clerk.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,

v.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS,
Defendant in Error.

No. 18,600.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief of Plaintiff in Error.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
October 25, 1903.

WM. B. BURFORD, PRINTER, INDIANAPOLIS

SYNOPSIS.

I. STATEMENT OF THE CASE.

II. HISTORY OF THE LAW IN INDIANA.

III. ARGUMENT.

1. The Law.
2. The Act.
3. The Infirmities of the Act.
4. The Decided Cases.
5. The Defendant's Briefs and Authorities.
6. The Majority Opinion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 81.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,

v.

THE STATE OF INDIANA ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS,
Defendant in Error.

No. 18,600.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief of Plaintiff in Error.

I.

STATEMENT OF CASE.

The General Assembly of the State of Indiana which met in 1899, passed what has since been commonly styled "The Mortgage Exemption Law." It went into force and effect on March 4, 1899. The law is short, and is hereinafter set out in full.

This action was begun by the relators in the Marion Circuit Court by filing an application "for a writ of mandate and prohibition," whatever that may be, to compel Harry B. Smith, as the Auditor of said county, to certify and allow as "exempt from taxation," so much of the assessed value of a certain piece of real estate as the relators claim should have been exempted under the said Act of 1899, by reason of the existence of a certain mortgage alleged to be upon the said realty, a copy of which is set out in the transcript (pp. 5-6).

The deed of the relators is set out in the affidavit upon which the writ was issued, and, as appears from the record, was never recorded, so that the Auditor had no record evidence of the ownership of the realty beyond the affidavit of the relator making the affidavit.

The mortgage is also set out in the transcript (pp. 4-5) and shows that it was given to secure eight notes of fifty dollars ($50) each, the first payable January 21, 1898, and one each year thereafter on the same date, so that, according to its terms, at least four of the notes, or two hundred dollars ($200) of the principal and the annual interest on all the notes, should, if the terms of the mortgage had been complied with, have been paid at the date of the filing of the affidavit and the bringing of the action.

The affidavit alleged to have been filed with the Auditor is part of the record. (Transcript, pp. 5-6.) It shows that Martha Lewis made oath that she was the owner of the described real estate; not that it was owned by herself and her husband, as tenants by entirety, as shown by the deed

itself; that the mortgage indebtedness was four hundred and fifty dollars ($450), while the mortgage itself showed only four hundred dollars ($400); the first and second descriptions in the affidavit were not alike; the first was clearly bad; the year for which exemption was claimed was omitted, or else must read, "190—," and nothing is stated as to any assignee of the mortgage, or his residence.

The petition herein claims "about $500" exemption, instead of four hundred and fifty dollars ($450), which it was alleged was the mortgage debt, and that "so much of their property is exempt from taxation."

The writ was an alternative writ, and alleged, as set forth therein, that the relators had complied with all the preliminary steps necessary to entitle them to the benefits of the deductions provided for in the said Act, but that the defendant, Harry B. Smith, as Auditor of Marion County, was refusing to allow them the deduction of five hundred dollars ($500) from the assessed value of their realty, as provided by the said Act of March 4, 1899, and demanded that the court, by its writ of mandate, require the Auditor to make the deduction on account of the mortgage indebtedness upon the said realty, as shown by the said affidavit, and as provided for in the said Act.

The alternative writ issued, and to it the defendant, Harry B. Smith, Auditor, on May 27, 1901, filed a demurrer. (Transcript, pp. 8-9.)

The case grew beyond the original intent. There was abundance of reason for refusing to allow the exemption demanded and claimed, by reason of the irregularities

above set forth in the affidavit and proceedings to obtain the alleged exemption, and because the same did not comply with the provisions of Section 2 of the Act, which prescribed what must be done by the applicant for exemption to obtain it. The constitutionality of the law becoming generally discussed all over the State, the Attorney-General entered an appearance in this cause in the lower court, all technical objections to the writ and affidavit were waived, and the constitutionality of the law, waiving questions of form, became, was and is the only question discussed in the record.

The demurrer was orally argued by counsel, and on June 12, 1901, the Judge of the Circuit Court of Marion County, Indiana, sustained it (transcript, p. 9), and held the act unconstitutional.

The relators declined to plead further, elected to stand on the complaint, and the court entered judgment. (Transcript, p. 9.)

From this judgment appeal was taken to the Supreme Court of the State of Indiana. The only error assigned was the ruling of the court on the demurrer. In the Supreme Court the case was briefed carefully, on both sides, and on February 28, 1902, the Supreme Court reversed the ruling of the Marion Circuit Court, three of the five Judges of the Supreme Court holding that the ruling of the Marion Circuit Court was erroneous and two dissenting, and thus the constitutionality of the Act was declared by a divided court, a three to two decision, and the cause was sent back to the Marion Circuit Court with instruc-

tions to reverse its ruling on the demurrer and overrule the same. (Transcript, pp. 9-10.)

Both the majority and minority opinions, and the opinion on the petition for rehearing, are made part of the transcript. (pp. 11-35.)

Thereafter, on May 24, 1902, in accordance with the instructions of the Supreme Court, the cause was redocketed in the Marion Circuit Court and the demurrer to the alternative writ was overruled, and the opinion of the Supreme Court was spread of record. (Transcript, p. 10.)

Thereafter, on May 31, 1902, Harry B. Smith, Auditor, plaintiff in error, filed two paragraphs of return to the writ; the first alleging the unconstitutionality of the Act under the State Constitution; the second alleging its unconstitutionality under the Constitution of the United States. (Transcript, pp. 36-41.) The answer sets out the Act in full. (Transcript, pp. 36-37, 38-39.)

To each of the answers or returns the relators demurred for want of facts (transcript, p. 41), and thereafter, on June 6, 1902, the Marion Circuit Court sustained the separate demurrers of the relators to each paragraph of answer. (Transcript, p. 42.)

The defendant thereupon elected to stand by his return as made, declined to make further return or answer further, and, thereupon, the court entered judgment for the relators. (Transcript, p. 42.)

This judgment the defendant, Harry B. Smith, Auditor, appealed to the Supreme Court of the State of Indiana (transcript, pp. 42-44) and such proceedings were had in

the said cause in the Supreme Court, that on June 27, 1902, the rulings and judgment of the Marion Circuit Court were affirmed by the final judgment of the Supreme Court of the State of Indiana, three of the five Judges of the said court joining in the affirmative opinion, and two again dissenting therefrom, as before. (Transcript, pp. 45-46.)

From this judgment a writ of error was taken to this court, where the whole question is again submitted for decision.

II.

HISTORY OF THE LAW IN INDIANA.

The so-called mortgage exemption law of Indiana has had a stormy existence. It was first introduced in the session of the Legislature of 1899. It was born in the heat of politics, and was always a political factor. It was much debated during the session, and its constitutionality was always questioned. It was hotly opposed by the best lawyers in both Senate and House of Representatives, but finally passed in the form in which it now appears in this cause by a narrow majority.

It went to the Governor, who had so much doubt as to its constitutionality that he declined to approve and sign it, but did suffer it to become a law without his signature. It went into force March 4, 1899. Its constitutionality was questioned all over the State. Attorneys gave opinions against it; county courts held it valid; others held it invalid. In many counties the officials, under the advice of their several county attorneys, attempted to enforce and carry out its provisions. In as many or more other counties it was pronounced unconstitutional and no effort was made to enforce its provisions. It was constantly a question for debate, and always on political grounds. It was called the "poor man's law," and every effort was made to bring it into favor. The legal profession generally pronounced it unconstitutional and vicious in its effect and results. So it has proven. In Marion County, where this case arose, the officials sought honestly to enforce it. The

result was instantly apparent. The tax rate rose steadily from $1.65 on the hundred dollars to $2.08, and the end is not yet.

The effect of the law became so pronounced, and it so affected the gross amount of taxes collected in this county, that a strict compliance with the provisions of the law began to be applied to the affidavits which were a prerequisite to the allowance of the exemption. Out of the refusal to allow an exemption on an alleged faulty affidavit this case grew. It grew beyond its original intent, and once being brought into court the faulty features of the affidavit were lost sight of, and all defenses except the unconstitutionality of the law were waived and this question, as the record shows, was the only one considered by the Circuit Court.

Marion County has most generally been blessed with talented judges. Being the center of the great business interests of the State, its bench has not been excelled in legal acumen and ability even by the Judges of the Supreme Court of the State. Judge Henry Clay Allen, of the Circuit Court, who decided this question, is no exception to the rule; he is an able and erudite lawyer. As such, he considered this case.

Soon after the inception of the case the Attorney-General, on account of the confusion which had ensued all over the State as to the enforcement of this law, appeared in the case. It was ably argued and debated from all points, and thereafter Judge Allen, after much deliberation and study, pronounced the law unconstitutional.

Appeal followed. It was exhaustively briefed and argued. The controversy continued. The Supreme Court divided upon it finally; three for the law and two against it.

The net result, disregarding rank of the judges, is that three judges have pronounced the law unconstitutional, and three as strenuously insist that it is constitutional. Therefore, we come to your Honors that we may know the law.

III.

ARGUMENT.

1. THE LAW.

There are two answers in this case; one setting up that the law in question herein is in conflict with the equality clause of the Fourteenth Amendment to the Constitution of the United States; the other setting up that the law is in conflict with a like provision of the Constitution of the State of Indiana.

The Constitution of the United States guarantees to each and every citizen the equal protection of the laws, and prohibits any State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which deprives them of life, liberty or property, without due process of law, or which denies to any citizen within its jurisdiction the equal protection of the law.

Fourteenth Amendment U. S. Constitution.

This provision of the Constitution applies to and covers all questions of unequal taxation.

Railroad Tax Cases, 13 Fed. Rep. 722 (732 et seq.);

Nashville, etc., Ry. v. Taylor, 86 Fed. Rep. 168 (179 et seq.);

Railroad and Telephone Cos. v. Board, 85 Fed. Rep. 302 (303, 317 et seq.);

Fraser v. McConway, 82 Fed. Rep. 257 (259-260);

Devenport v. Cloverport, 72 Fed. Rep. 689 (693-694);
Myers v. Shields, 61 Fed. Rep. 713.

It will be sufficient for us to quote a short extract from the Railroad Tax Cases, to show how clearly the courts have settled this question. We quote from page 733:

> "The Fourteenth Amendment to the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it can not deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.
>
> "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible."

The above quotation, and the cases cited, show clearly a federal question in this cause.

The State Constitution of Indiana as clearly prohibits unequal taxation as does the Constitution of the United States. Therefore, when we discuss one answer in this cause we discuss both.

The Indiana State Constitution provides, in the Bill of Rights constituting the first Article thereof, that:

"ARTICLE 1.—BILL OF RIGHTS.

"68. (68.) Privileges Equal.—23. The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

"ARTICLE 4.—LEGISLATIVE.

"118. (118.) Local Laws Forbidden.—22. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * * *

"For the assessment and collection of taxes for State, county, township, or road purposes;

"119. (119.) Laws Must be General.—23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

"ARTICLE 10.—FINANCE.

"193. (193.) Assessment and Taxation.—1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

The laws require, therefore,

1. That the General Assembly shall provide a law for assessment and taxation;

2. That the law must provide for a uniform and equal rate of assessment and taxation;

3. That such law shall prescribe such regulations as shall secure a just valuation, for taxation, for all property, both real and personal;

4. Excepting such only for

(a) Municipal,
(b) Educational,
(c) Literary,
(d) Scientific,
(e) Religious, or
(f) Charitable purposes

as may be exempted by law.

This leads us at once to inquire the purpose of such a provision in the Constitution of the State, and of the prohibition in the Fourteenth Amendment of the Constitution

of the United States. Why were they enacted? What conditions were they intended to correct and reform? And, at the very threshold of the investigation, we find that in the absence of constitutional restriction the power of the Legislature to exempt classes of property is unquestionable and absolute.

25 Am. & Eng. Enc. Law, p. 156;
Indianapolis v. Sturdevant, 24 Ind. 391;
Trustees M. E. Church v. Ellis, 38 Ind. 3 (7).

Thus, the man with influence in Congress or in the Legislature was able to procure laws that gave distinct advantage to persons and classes of property. This evil the Constitutional Convention of Indiana sought to remedy, and in its wisdom formulated the foregoing constitutional provision. The limitations and restrictions contained in it are marked, and will be effective if adhered to, but departure from the strict rule means confusion. Under this constitutional provision the Legislature must pass a law providing for "a uniform and equal rate of assessment and taxation," embodying in it such regulations as "shall secure a just valuation for taxation, of all property, both real and personal," * * * "excepting" certain enumerated classes of property therein named.

It will be noticed that this section relating to taxation divides itself into two distinct parts, separated by a semicolon, and each part of the section relates to a different proposition. The first one fixes the general right of the Legislature, and provides that it shall pass a law, and

that it shall provide for a uniform and equal rate of assessment. The second part of the section relates purely to the question of securing a just valuation of property. Thus, the two things which are important in a law relating to taxation are provided for: first, the law and the rate; and second, the just valuation of the property.

It must be borne in mind that neither of these has aught to do with the other. One rests entirely within the province of the General Assembly, viz.: that part of the law which provides that it shall pass and provide a law which shall fix a uniform rate. The second part of the section requires only that it shall, in some way, provide the necessary machinery to make a just valuation of the property, to which the uniform rate provided for in the first part of the section shall be applied. We shall call attention to this peculiarity in this section later in this argument.

The provision that "all property, both real and personal," shall be taxed, precludes exemption by the Legislature of any property from taxation.

25 Am. & Eng. Enc. Law, p. 156, note;
Memphis, etc., Ry. Co. v. Gaines, 97 U. S. 697;
Trustees M. E. Church v. Ellis, 38 Ind. 3 (7);
Memphis, etc., Ry. Co. v. Gaines, 3 Tenn. Ch. 604;
Ellis v. Louisville Ry. Co., 8 Baxt. (Tenn.) 530;
State v. Hannibal, etc., Ry., 75 Mo. 208;

New Orleans v. Lafayette Ins. Co., 28 La. An. 756;
Chattanooga v. Nashville, etc., Ry. Co., Lea (Tenn.) 651.

But, on the other hand, if the constitutional provision by its terms permits exemption, then, within the limits of its provisions, exemptions may be made by law, by the Legislature, but no exemption can be made outside of the limits specified.

State, ex rel. Tieman, v. Indianapolis, 69 Ind. 375 (376-7);
Chesapeake, etc., Ry. Co. v. Miller, 19 W. Va. 408;
Hogg v. Mackey, 23 Ore. 339; 31 Pac. R. 779; 19 L. R. A. 77.

It is plainly apparent from the reading of the exceptions enumerated in the above section, that this law or Act does not come under any of the exceptions of the statute. As no such claim has ever been made in any of the discussions relating to it, we do not stop to discuss this question further.

It is further true that any law exempting either persons or property from taxation must be strictly construed, and it has been settled that the provision under discussion (Article X, Section 1) must be so construed.

Trustees M. E. Church v. Ellis, 38 Ind. 3 (8);
Read v. Yeager, 104 Ind. 195 (200);
Conklin v. Cambridge, 58 Ind. 130;

City of South Bend v. University, 69 Ind. 344.
State, ex rel., v. City of Indianapolis, 69 Ind. 375;
Warner v. Curran, 75 Ind. 309;
Orr v. Baker, 4 Ind. 86;
Indianapolis v. McLean, 8 Ind. 328;
Indianapolis v. Grand Lodge, 25 Ind. 518 (521);
25 Am. & Eng. Enc. Law, p. 157.

The burden is also on him who claims the exemption to show that his case falls clearly within the law.

25 Am. & Eng. Enc. Law, p. 159.

But not only is the burden on him who claims the exemption, but his pleading must set out the facts that exempt him.

Cairo, etc., Ry. Co. v. Parks, 32 Ark. 131;
Appeal Tax Cases v. Rice, 50 Md. 302 (312-3).

And the test in every instance of exemption, as to whether it is within the limits of the constitutional provision, is the use.

Travelers Ins. Co. v. Kent, 151 Ind. 349 (353);
State, ex rel. Tieman, v. Indianapolis, 69 Ind. 375 (378);
25 Am. & Eng. Enc. Law, pp. 166, note, 167-8.

And the exemption never applies to an individual owner, but always to the public character and use of the exempted property.

> Travelers Ins. Co. v. Kent, 151 Ind. 346 (353-4).

And we might add, just here, that nearly all the cases cited by the learned Attorney-General and his eminent co-counsel, in their briefs filed in this action, relate only to specific cases where the parties are seeking to show that they come within some of the exemptions of the statute, and only a very limited number of them discuss or have any constitutional question in them.

2. THE ACT.

> **"AN ACT concerning the taxation of real estate encumbered by mortgage, and declaring an emergency.**
>
> [S. 17. LAW WITHOUT GOVERNOR'S SIGNATURE MARCH 4, 1899.]
>
> "Section 1. Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year:

Provided, That no deducton shall be allowed greater than one-half of such assessed valuation of said real estate.

"Sec. 2. Any person desiring to avail himself, or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the Auditor of the county wherein said real estate is situate, a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or bona fide owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

"Sec. 3. The County Auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the Auditor of the county wherein the mortgagee, assignee or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

"Sec. 4. Any person who shall willfully make a false statement of the facts provided for in Section 2 of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty, nor more than

five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

"Sec. 5. Whereas, an emergency exists for an immediate taking effect of this act, the same shall be in force from and after its passage."

Acts 1899, p. 422;
Burns Rev. Stats. 1901, Secs. 8417 et seq.

The Act being short we have set it out in full. Having in mind, then, the provisions of our Constitution, and the well settled rules of law hereinbefore set out, let us now examine it critically, and we feel sure that the court will at once perceive its unconstitutional features. It is in five sections. The fourth section, a penal provision against false statement, and the fifth section, the emergency clause, cut no figure in this case, and we shall drop them from any discussion.

Section 1 shows to whom the law applies, and provides:

1. "That any person

(a) Being the owner of real estate liable for taxation within the State of Indiana,

(b) And being indebted in any sum secured by mortgage upon real estate,

may have the amount of such mortgage indebtedness,

(c) Not exceeding seven hundred dollars ($700),

(d) Existing and unpaid upon the first day of April of any year,

deducted from the assessed valuation of the mortgaged premises for that year;"

2. "And the amount of such valuation remaining after such deduction shall have been made, shall form the basis for assessment and taxation for said real estate for said year."

"3. Provided, No deduction shall be allowed greater than one-half of such assessed valuation of said real estate."

The court will see, instantly, that the very first clause of the first sentence of the law creates a class, viz.: "Persons owning real estate liable for taxation in this State," which, of course, excludes from the provisions of the law to follow:

(a) All persons who do not own real estate in the State;

(b) All persons owning real estate in the State which is not liable for taxation.

In other words, this clause excludes, as an examination of any tax duplicate will show, more than half the taxpayers from the provisions of the law about to be enacted.

The next clause of the same sentence, however, makes still further limitations, and restricts the operation of the law about to follow to those of the above class who

(c) Are indebted in any sum secured by mortgage upon real estate,

thus again restricting the operation of the law to a much smaller class, to wit: those owning real estate who are "indebted in any sum secured by mortgage," and, so far as the provision of the law is concerned, the indebtedness

secured by mortgage is not limited to the real estate in the county, or even in the State, nor to the particular property mortgaged. It may be anywhere.

Thus there is excluded from the operation of the law all owners of real estate whose realty is unincumbered by mortgage, whether because the credit of the excluded persons is such that a mortgage is not exacted of them, or their honesty is so unquestioned that belief in their intention and ability to pay induces the creditor not to exact mortgage security, persons certainly equally worthy of the benefits of the law, but who by its provisions are excluded from it; thus at once violating the above constitutional provision for "uniform and equal rate of assessment and taxation," and thereby prescribing a "regulation" which even its most zealous advocates can not claim "secures a just valuation for taxation of all property, both real and personal."

Neither will it do to answer that the classes excluded by this law have the right to deduct their indebtedness under other provisions of the laws from credits, since the provisions of those other laws, if any there be, must be equally applicable to those persons within the purview of this law, as well as to those excluded from it. This conclusively shows that the law is drawn to give an undue advantage to the mortgage debtor over others.

Further, the amount to be deducted is not the amount of the mortgage debt, but an amount "not exceeding seven hundred dollars." It is a gross deduction, not fixed by any rate nor having any uniformity. It is an arbitrary pro-

vision and amount; one that in the very nature of the case is fixed arbitrarily and without law therefor, and in equal measure, even among those persons coming within the purview of the law, violates the constitutional provisions for "uniform and equal rate of assessment and taxation."

Again, the indebtedness that may be deducted is only the indebtedness "existing and unpaid upon the first day of April of any year," thus, without reference to rate, or uniformity, or any existing equities, excluding all debts that may have existed during the entire tax year, but which fell due and were paid on March 31st, or immediately preceding days, notwithstanding the fact that the tax payment is always a year behind, and the debt had an actual existence during the entire tax year. This, again, is arbitrary, without any ratable feature or uniformity in it, and a clear violation of the constitutional provision under discussion.

A most happy illustration of the inequalities of this law in its application is made by Judge Dowling in his dissenting opinion, which appears in the record (pp. 25-26).

Again, the law provides, in the second clause of this section, that, after deducting the arbitrarily fixed sum of seven hundred dollars, or "one-half of such assessed valuation of said real estate," as the case may be, "the amount of such valuation remaining after such deduction shall have been made, shall form the basis for assessment and taxation for said year." Thus fixing a basis of valuation for assessment arbitrarily, and not by a law with a provision for "a uniform and equal rate of assessment and

taxation," but by a law which arbitrarily fixes an amount, without any ratable provision, and which provides that the arbitrary amount or valuation thus obtained after such seven hundred dollars deduction, shall form the basis for assessment. This fixes the amount of the assessment arbitrarily, and not by any ratable rule, nor with any uniformity.

Again, the proviso says that "no deduction shall be allowed greater than one-half of such assessed valuation of said real estate," the "such assessed valuation" meaning, clearly, the arbitrary fixed valuation which is reached after deducting the arbitrary sum of seven hundred dollars, or "one-half the assessed valuation," from the appraised value of the realty. This, again, clearly violates the constitutional provision "for a uniform and equal rate of assessment and taxation," and fixes the value for assessment arbitrarily, by making the value for assessment the amount reached by a process of subtraction of an arbitrary amount, instead of an assessment based on the appraisement and valuation of the realty. The deduction is inevitable. The law must be unconstitutional. It can not be otherwise, it seems to us, by any process of reasoning.

This process of fixing the valuation of realty also ignores all laws for assessment. We have by law, in Indiana, the office of Assessor, and his duties are laid down in the written law. He is given the power and the authority, by law, to assess realty, and no other officer has it. After his work is done and reported to the Auditor, to calculate the tax upon the property at the rates fixed as pro-

vided by law, this arbitrary deduction must be made by the Auditor, in the event of the filing of the necessary affidavit by the owner of the mortgaged property, and the arbitrary amount provided by this law deducted from the Assessor's valuation, and the Act then provides that the "amount thus obtained after making the deduction of the said seven hundred dollars," or whatever the amount may be, "shall form the basis for assessment." The result of this provision, of course, is to set aside the entire work of the Assessor, who had, by law, up to that time fixed the assessment of the property on the basis of the value thereof.

Section 2. This section is the one providing what the one wishing to avail himself of the provisions of this law must do to obtain the arbitrary benefits provided for in Section 1. It provides that "any person desiring to avail himself of the provisions of this Act shall, between the first day of March and the first day of May, of each year, file with the Auditor of the county wherein said real estate is situate, a sworn statement" of

(a) The amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving

(b) The name and residence of the mortgagee;

(c) The name and residence of the assignee or bona fide holder, if known;

(d) If unknown, stating that fact;

(e) The record and page where the mortgage is recorded;

(f) A description of the realty upon which such incumbrance exists.

No affidavit as to the actual ownership of the realty is required, thus opening wide the door for fraud, and no provision is made for cases where the record, as in this case, shows a different owner of the realty than the affiant, whose deed was not recorded, or how, in such cases, the actual ownership is to be determined; whether by the affidavit or the record, or whether the Auditor must sit as a court to undo the Assessor's work and determine against whom the realty should be assessed.

We say this, not as a defense to this individual case, because, in so far as it relates to the particular affidavit in this case, we waive all propositions except the constitutionality of the law; we only mention these points to show the crudeness of the law or Act under discussion.

Section 3. This section provides that:

> "The County Auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the Auditor of the county wherein the mortgagee, assignee or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

The weaknesses of this section are:

1. The Auditor must become an assessor, and, not only in this case, but in every case where an affidavit is filed, he must undo the County Assessor's work; deduct

from it seven hundred dollars, or such other sum as may be deductible, and, by a system and process of subtraction, make and establish a new "basis" of assessment and valuation, neither "ratable" nor "uniform," but arbitrarily fixed, and thus do over the Assessor's work.

2. He must decide next whether the "money, notes or credits evidenced by such mortgage indebtedness are liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate." Again he is made Assessor, to decide assessment questions, for which no authority, ways or means, or compensation are provided; a thing that, not being the assessing power or officer, he has no authority to do.

3. If he decides that the money, notes or credits are assessable in any other county in the State, he must send a copy of "such sworn statement to the Auditor of the county wherein the mortgagee resides," but there is no provision, or law, or requirement in the law, that

(a) Either makes the mortgagee or holder liable for tax on the amount deducted;

(b) Or which requires the Auditor, or Assessor, or any other person in the county to which the "sworn statement" is sent, to put it upon the tax duplicate against the holder of the debt;

(c) Or which requires the Auditor, even in his own county, after he deducts from the applicant's assessment a mortgage debt owned by a person in the same county, either to assess it against the holder of the debt, or which even authorizes him to do so.

(d) As to all mortgage indebtedness that may be held out of the State or county, there is no provision whatever. It is at once lost to taxation, forever, to the injury of every taxpayer, and in violation of the constitutional provision that requires the Legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal."

By this provision there goes out from under taxation seven hundred dollars of each mortgage held out of the State, and how long will it be, under this law, if it be permitted to stand, until all our mortgage indebtedness will be held out of the State? Thus the whole framework of the argument as to equity of this law falls. It does not prevent the so-called "double taxation," because there is no law taxing the deduction to any one else. It is simply a means of exemption, and of taking a large amount of taxable property off the tax duplicate. The whole law was a bit of political buncombe that has cost every honest taxpayer a certain per cent. of taxes over and above that which he has heretofore paid. It discriminates against the thrifty man who has relieved himself from debt and his property from mortgages; it offers a premium for mortgage indebtedness and places a penalty upon thrift; it is not equitable; the proper adjective is iniquitous.

(e) Further, as to the State school funds, the law has a most disastrous effect. The public school fund of the State of Indiana now amounts to about twelve million dollars, held by the Auditors of each county and by the Auditor of State, who must, by

law, loan it and apply the income therefrom to the support of public schools. The individual loan is limited by law to two thousand dollars, and out from under taxation, by virtue of this law, goes seven hundred dollars of every loan which is made from these funds over the whole State. These funds are public funds, and not taxable, and when deducted from the mortgagor's assessment can not be taxed to any other person. As the loans from the school fund are limited in amount it instantly appears that the effect of the law is to exempt from taxation one-third of the amount of the school fund of the entire State. The fact is, however, that most of the loans from the school fund are in small amounts, and the average loan is nearer one thousand dollars than two, as an examination of the records in any county will show. Upon this basis the effect of this law is to exempt from taxation seven-tenths of every thousand dollars of the entire school fund, and it is but a matter of calculation to make it clearly apparent that the actual amount exempted from or lost to taxation is nearer three-fourths of the entire school fund than one-third.

The disastrous effect of this law, if permitted to stand, on the question of taxation, and its injustice to every taxpayer, can not be made more apparent than by this exclusion from taxation of this tremendous amount from the taxable funds which belong to the common school fund.

8. THE INFIRMITIES OF THE LAW.

Having thus analyzed the law we will state, briefly, the points wherein we contend it violates both the Constitution of the State of Indiana and the Fourteenth Amendment. The objections to it are:

1. The lack of constitutional uniformity and equality in the rate of assessment and taxation;
2. It is a special law for the assessment of taxes for State, county, township and road purposes;
3. It grants to one class of citizens privileges and immunities which, upon the same terms, will not equally apply to all citizens;
4. It exempts from taxation realty not held for municipal, educational, literary, scientific, religious or charitable purposes.

It is fundamental that if it shall be found, upon examination, that any one or more of these propositions is true, then the statute must be held invalid. We shall discuss them in their order.

1. The constitutional provisions hereinbefore set out have been in force in Indiana since November 1, 1851. Many statutes regulating the assessment and collection of taxes have been adopted by the General Assembly since said date, but never, until this Act was passed, has any law in this State attempted to exempt realty from taxation because it was incumbered by mortgage. Judge Dowling, in the able dissenting opinion, calls attention to this fact, and emphasizes it as the legislative interpretation of the Constitution for the half century elapsing be-

tween the adoption of our Constitution and the passage of this Act.

Section 1, Article X, of the Indiana Constitution, hereinbefore set out, requires that "The General Assembly shall provide by law, for a uniform and equal rate of assessment and taxation." There is no limitation upon this. There can be but one rate, "uniform and equal." We have already called attention to the fact that this constitutional provision consists of only two clauses, each separated from the other. The first clause, above quoted, relates only to the "rate." There is no other provision as to rate. There it stands, wholly unmodified, and providing for one rate, and only one. The bodies, state, municipal, county, township and school, make their several rates of assessments and certify them to the County Auditor, who combines them and calculates the total rate of assessment. The Assessor likewise reports to the Auditor his valuations made by law; the Auditor then applies the total rate to the assessment fixed by the Assessor and calculates the tax.

The second clause of the section relates only to valuation of the property for taxation, and provides that there shall be enacted "such regulations as shall secure a just valuation for taxation of all property," etc. The first clause fixes an unalterable rule of one rate, uniform and equal, and is the basic provision of the section. Under the second clause there must be provided ways and means to assess and value the property, so as to make the valuations just. In the valuation there may be variation, as men's judgment may differ as to what any taxable property

is worth; but to the value once fixed, the single rate must be applied to determine the amount of each man's taxes. The valuation may vary with the judgment of men; the rate can never vary, under this provision. Herein lies the weakness of this Act. The operation of it varies the rule.

To illustrate: A and B own adjacent lots valued at twenty-one hundred dollars each. A's lot is unincumbered. B's is incumbered for seven hundred dollars. The Assessor assesses each at twenty-one hundred dollars. The lists go to the County Auditor. B makes the necessary affidavit and is allowed the exemption, and pays only on fourteen hundred dollars, or two-thirds the tax of A. The amount deducted is arbitrarily fixed, and results, after the Auditor makes the deduction, in a new valuation, which the law says "shall form the basis for assessment and taxation for said realty." Thus the Asesssor's work is undone; his valuation supplanted by another valuation not based upon the value of the property, not made by the assessing officer, but reached by the deduction of the fixed statutory provision of seven hundred dollars. This not only varies the rate, as between A and B, but B's valuation for assessment is not the "just valuation for taxation" required by the constitutional provision.

As the Court in the dissenting opinion says, the word "just" in the context means, "correct, honest, true" value, and relates only to the Assessor's valuation. It can not relate to the rate, or the first clause of the section, or in any way modify the "uniform and equal" provision of the first clause of the section. Thus, A's lot is valued at

twenty-one hundred dollars; B's at fourteen hundred dollars, though lying side by side and of equal value, violating the well-known rule that the tax follows the thing against which it is assessed, and that the rate should be applied to the thing assessed at its "just" or "true" valuation. The only excuse for the difference between A's tax and B's is that one lot is mortgaged for seven hundred dollars. The fallacy of this proceeding lies in trying to reach the net amount the man is worth and applying the rate to that, instead of doing as the provision of the Constitution requires, viz., fixing a "just valuation" of the property itself and then applying the rate to that valuation. The first method of procedure violates the constitutional provision by applying the rate, not to the "just valuation" of the ground, but to that valuation less the mortgage lien permitted to be deducted. This method is illegal and in violation of the Constitution and rules laid down by the Courts.

Cooley's Const. Lim. (6th Ed.) 608;
2 Kent Com. 231;
Bright v. McCulloch, 27 Ind. 223;
Cleveland, etc., R. R. Co. v. Backus, 133 Ind. 513;
Willis v. Crowder, 134 Ind. 515.

A discussion of this branch of the case, most aptly put, will be found in the dissenting opinion of Judges Dowling and Monks, which is made part of the record in this cause. (Record, pp. 23-25.) The case could not be more forcibly stated than it is there.

2. The second objection to the law is that it is special, and in violation of Section 22, Article IV, of the Constitution, hereinbefore set out in this brief.

This provision of the Constitution prohibits the General Assembly from passing local or special laws for the assessment and collection of taxes for state, county, township or road purposes. To us, a mere reading of the law is sufficient to show its special character. It is not general, either as to the thing upon which it operates, or as to the persons who are benefited by its provisions. The very title limits the Act to the question of the taxation of "real estate incumbered by mortgage." It does not apply to real estate generally, nor to real estate incumbered by liens generally, but is confined arbitrarily, as it seems to us, only to such real estate as is incumbered by a particular kind of lien. This is certainly a violation of the constitutional provision against special laws, and discriminates against every other holder of real estate which is unincumbered, or which is incumbered by liens of other character. It thus discriminates, even, against other persons who own incumbered real estate, since the benefits of the law extend only to the man whose real estate is incumbered by mortgage. As Judges Dowling and Monks say, in the dissenting opinion (Record, p. 25):

> "It can not be defended on the ground that there are two separate estates in lands incumbered by mortgage, and that this fact constitutes a basis of classification. The law declares that for the purpose of taxation the mortgagor shall be deemed the

owner of real property until foreclosure and possession taken by the mortgagee. 'In cases of mortgaged real estate, the mortgagor shall, for the purpose of taxation, be deemed the owner until the mortgagee shall have taken possession of the mortgaged premises, after which the mortgagee shall be deemed the owner.' Sec. 28, p.—, Acts 1891; Sec. 8438 Burns, 1901.

It has been held repeatedly by this court that a mortgage conveys no estate in the lands mortgaged, but simply creates a lien. Sec. 1099 Burns, 1901; Reasoner v. Edmunson, 5 Ind. 393; Francis v. Porter, 7 Ind. 213; Norton v. Noble, 22 Ind. 160; Grable v. McCulloh, 27 Ind. 472; Fletcher v. Holmes, 32 Ind. 497."

Wherein lies the difference between a mortgage lien and other liens? How does a mechanic's lien, a vendor's lien, a tax lien, a street improvement lien, or any other character of lien upon real estate, differ from the lien of a mortgage? Why should the owner of land incumbered by mortgage be favored with an exemption from taxation of seven hundred dollars, and the owners of land with liens of other character, hereinbefore referred to, be excluded from the law? What is it that gives a mortgage lien more dignity, or makes it more deserving of exemption, than other liens? To our mind there is nothing; there is no reason for exempting the mortgage lien as against other liens, and the statute is a clear violation of the law against discrimination, and is, therefore, one of those special Acts prohibited by the above clause of the Constitution, and the Fourteenth Amendment.

The great class of persons referred to in the Act is the debtor; or, in a more limited sense, the debtor who owns real estate subject to lien. We doubt, even, if the first classification would be good, and certainly the last one is clearly bad—too limited. Now, where is there any authority, in law or in reason, for subdividing the class of debtors, or the class of owners of real estate incumbered by liens, into another class, as this law does for the owners of realty subject to a mortgage lien? And why should this class be favored by a special Act, and the other class discriminated against? The dissenting opinion of Judges Dowling and Monks (pp. 25-26 of the Record) sets forth a very happy illustration of this point. It says:

> "To illustrate the practical operation of the statute, let it be supposed that A, B, C, D and E, each, is the owner of a lot of the value of $1,400 on the same street, in the same block, in the same town. A's lot is subject to a mortgage lien of $700; B's to a vendor's lien of $700; C's to a mechanic's lien of $700; D's to a street improvement lien of $700; and E's to the lien of a judgment for $700. Can any reason, valid in law, be given why A should have the right to a deduction of $700 from the value of his lot, as the basis of assessment and taxation, but that B, C, D and E shall be denied that privilege? Why the amount of such valuation, remaining after such reduction shall have been made, shall form the basis for assessment and taxation for said real estate, in A's case, but that the full amount of the valuation of the lots owned by B, C, D and E, without any deduction for the liens upon

them, should form the basis of such assessment against them, it is impossible to discover.

"But even as among the favored owners of real estate encumbered by mortgage liens, the classification is unequal and unjust. If A owns a lot valued for taxation at $1,400, encumbered by a mortgage lien of $700, he is allowed a deduction of $700. But if B owns a lot valued at $500, encumbered by a mortgage lien of $700, he is allowed a deduction of $250 only. Upon what natural or reasonable basis do these discriminations rest? Is not the statute 'discriminative between individuals of the (so-called) class, and does it not select some for an exceptional burden?' Suppose, however, the reasons urged in support of the statute in question are valid; that as it applies to all persons belonging to a class into which all property owners of the State may at some time enter; and as it is not, in terms, limited to individuals of a class, it is therefore not in conflict with the Constitution. All enactments having these qualifications, it is said, are to be regarded as within the limitations of the Constitution. The owners of all real estate incumbered by mortgage constitute a natural class, and legislation applying to all of them is general and not special. It follows that the owners of all real estate incumbered by vendors' liens constitute another class just as distinct and quite as natural; the owners of real estate incumbered by mechanics' liens, another; the owners of real estate incumbered by street improvement liens, another; and the owners of real estate incumbered by judgment liens, still another. Therefore, no objection could be taken to a further Act of the Leg-

islature declaring that the owners of real estate liable for taxation in the State of Indiana, being indebted in any sum secured by a vendor's lien upon real estate, may have the amount of such indebtedness, not exceeding $1,000, deducted from the assessed valuation of the incumbered premises for the year, and that the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for that year. Then, other separate Acts fixing deductions of $1,500 for indebtedness secured by mechanics' liens; $250 for indebtedness secured by street improvement liens, and $100 for indebtedness secured by judgment liens, must also be unobjectionable. Could such legislation be defended? If not, by what argument can a classification, which selects as the objects of its favoritism one set of debtors, and excludes all others, notwithstanding their situation is, in every legal aspect, undistinguishable from that of the favored individuals, be saved from the condemnation under the Constitution?"

Upon this branch of the case see the following cases, the first of which is particularly applicable to the point of classification just argued:

Washington University v. Rouse, 8 Wal. 444;
Knowlton v. Supervisors of Rock Co., 9 Wis. 421;
Van Riper v. Pearson, 40 N. J. L. 1, 9;
State v. Hammar, 42 N. J. L. 435, 440;
Randolph v. Wood, 49 N. J. L. 85;
Lippman v. The People, 175 Ill. 101, 106;

Ex parte Jentzsch, 32 L. R. A. 664, 665;
Darcy v. San Jose, 104 Cal. 642;
Pasadena v. Stimson, 91 Cal. 238;
Cooley's Const. Lim., 393, 395;
Bank of the State v. Cooper, 2 Yerg. 599;
Officer v. Young, 5 Yerg. 320;
Griffin v. Cunningham, 20 Grat. 31;
Arnold v. Kelley, 5 W. Va. 446;
Lewis v. Webb, 3 Greenl. 326;
State v. Ellet, 47 O. St. 90;
State v. Hinman, 65 N. H. 103;
State v. Sheriff, 48 Minn. 236;
Hogg v. Mackay, 23 Ore. 339;
State v. Gardner, 58 O. St. 599.

The most praiseworthy industry of both counsel and court—and when we say "court," we refer both to the Judges who wrote the dissenting opinion and to the Judges who wrote the majority opinion—has been unable to find any State or Federal decisions which sustain an arbitrary classification of the character made in this law. We so assert, for the reason that the prevailing opinion in this case cites no such case; while, on the other hand, as we shall show, later in this brief, when we come to discuss the decided cases, there are many cases holding classification of almost identical character obnoxious to the several State and Federal Constitutions.

The case of Van Riper v. Pearson, supra, holds that classification "is a domain from which special and local legislation is utterly excluded whenever the legislative end can be effected by general law."

Also, that "interdicted local and special laws are all those that rest on a false or deficient classification * * * ."

The case of State v. Hammar, supra, holds:

> "There must be substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation."

The case of Randolph v. Wood, supra, holds:

> "Such law must embrace all, and exclude none, whose condition and wants render such legislation equally necessary or appropriate to them as a class."

The case of Lippman v. The People, supra, decides:

> "The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances."

The case ex parte Jentzsch, supra, decides:

> "A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all."

Also: That "While the classification was, in itself, arbitrary, as in this case, the law did not include all who came within the arbitrary classification thus made."

The case of Pasadena v. Stimson, supra, holds:

"The conclusion is that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disability or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

The case of Darcy v. San Jose, supra, holds:

"Classification, however, must be founded upon differences which are either defined by the Constitution, or natural, and which will suggest a reason which might rationally be held to justify the diversity in legislation."

"Every one has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized by the law." * * *

"The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnox-

> ious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be leaned against as probably not contemplated or designed." (Cooley's Const. Lim., 393, 395.)

Great stress was laid by counsel for the State, in his brief filed in these cases, upon the case of Florer, Treas., v. Sheridan, 137 Ind. 128. The statute in question was one relating solely to personal property, and permitted the deduction from personal property of all a man's debts, and made only the surplus or excess the subject of assessment and taxation. Whatever may be said of the propriety of that decision, it cannot be denied that the classification of the persons who were entitled to avail themselves of it was general; as it permitted the deduction of all the debts which a man owed from the value of his personal property it did not vary the ratio, a thing which is in "striking contrast" with the provisions of the Act before us. However, we do not even defend that law, and in that case the following very vigorous dissenting opinion by Judge Howard was filed:

> "I am constrained to withhold my concurrence in so much of the foregoing opinion as holds that the Constitution permits the enactment of a law which authorizes the deduction of debits from credits in the giving in of notes, choses in action, etc., for taxation. I am of the opinion that all the property of the State, including all credits, and save only such property as is expressly exempted by the Constitution, should be subject to equal and uniform taxation."

The dissenting opinion is short, but very pithy, in view of this discussion, and we cannot but feel that the vigorous dissenting opinion had the best of the argument.

3. We contend that this law grants to one class of citizens privileges and immunities which, upon the same terms, will not equally apply to all citizens, and therein particularly violates, also the Fourteenth Amendment to the Constitution of the United States.

The provisions of this Act of March 4, 1899, limit the the privileges therein provided for to a particular class of debtors, upon whose realty there is a mortgage. It does not apply, upon the same terms, to all citizens of the State. The law provides for a special mode of assessment, whereby a reduction of the valuation on the real estate made by the Assessor for purposes of taxation is brought about, and the remainder, which is left after the deduction provided for by the law, is made to constitute the new basis, or valuation, upon which the tax is calculated at the given rate.

Another section of the Act provides the terms, as we have shown, upon which this privilege may be claimed, and only a very limited class of debtors comes within its terms. The great body of citizens of the State is excluded from the benefits of the privilege secured to the few who own mortgaged realty. For instance:

(a) All who own land, but are not indebted at all, must be assessed upon the full value made by the assessor.

(b) All owners of land who are indebted, but whose debts are not secured by mortgage on the land, are excluded.

(c) All owners of real estate who may owe debts in the shape of liens other than mortgage liens, are excluded from the benefits of the law.

(d) All citizens not owning real estate, but who hold mortgaged goods and chattels, are denied the privileges of the law.

And the incidental granting of the privilege to one of these several classes of debtors denies it to all the others, because none of the others can make the affidavit necessary to put themselves within the favored class. Thus, it is apparent that another vice of this statute lies in the classification; it makes a class of mortgaged debtors within the great class, debtors.

And it is perfectly evident that, if this law is constitutional, another law might be drawn exempting some fixed amount of liens of other character against real estate, as judgment liens, tax liens, vendors' liens, and liens of all classes. It is perfectly evident, too, that if the law is constitutional the amount of seven hundred dollars may be increased, at any time, or varied in amount, as between the different kinds of liens, and thus the number of classes within a class made infinite.

If the law is to be upheld as constitutional, it is evident that different legislatures, by increasing the amounts, from time to time, and increasing the number of classes, could thereby accomplish the absolute exemption of all real estate from taxation. And, on the other hand, it is equally apparent that the class of mortgage debtors who have mortgages upon real estate might be further modified by mort-

gages amounting to ten thousand dollars, for instance, or any other sum, and might thereby bring the favored class, who are entitled to exemption, down to a dozen, or even to one person.

The fallacies of the law become so apparent, as it seems to us, upon critical analysis of it, that its unconstitutionality seems too plain for question.

4. We contend, further, that the effect of this Act is to exempt from taxation property not coming within the privileged classes set forth in the Constitution.

The constitutional provision which we have heretofore quoted provides for "a just valuation for taxation, of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious and charitable purposes, as may be specially exempted by law." This provision of the Constitution, therefore, permits exemption within the limits of the exceptions. It will be noted that all the exceptions which are contained in the Constitution relate to property which is held for some public use or purpose, either for the municipality, or for educational, literary, scientific, religious or charitable purposes. There is nothing in any of the exceptions authorizing the exemption of private property of any person or individual, or any part thereof. The constitutional rule requires that all property shall be valued for taxation except that exempted by law within the bounds of the exceptions of the Constitution.

It seems clear, therefore, that seven hundred dollars exemption of mortgage indebtedness from the property of an

individual is a violation of that provision of the Constitution which requires that all property shall be taxed. It has never been contended by those who sought to defend this law that it comes within any of these exceptions. Indeed, Judge Gillette, who pronounced the majority opinion in this cause, says (Record, p. 15): "The enactment in question cannot be supported as an exemption law." But the practical effect of the law is to exempt seven hundred dollars of each person's property who owns mortgaged real estate, or that proportion thereof which is provided by the law.

The State's attorney undertakes to avoid the proposition that it is an exemption, by calling it a "deduction." But, call it what you will, deduction or exemption, the owner of land which is mortgaged enjoys the immunity, and is exempted from a portion of the tax with which all others are burdened. And, as taxes must be for the amount necessary to meet the public demands, the proportion in which the tax of the favored man is reduced necessarily increases the rate upon the other taxpayers, and the effect of the law is not only to exempt him from a portion of his burden, but, also, proportionally to increase the burden of the one not exempted.

The Constitution clearly prohibits any such exemption, or such favoritism, and we contend that any law which indirectly produces an exemption is void. That cannot be accomplished indirectly which the Constitution declares shall not be done directly, as Justice Field so pointedly holds in Huntington v. Worthen, 120 U. S. 97.

4. THE DECIDED CASES.

As we read the law, the question which forms the issue in this case has been many times decided, and decided adversely to the position of the defendant in error in this cause. We shall, in this connection, therefore, set out with some care those cases which, we believe, settle and decide all the questions involved in the issue herein. And first, merely on account of the locality, we call attention to the case of State ex rel. Tieman, et al., v. City of Indianapolis, 69 Ind. 367, which the Circuit Court of Marion County held to be decisive of this whole question.

The relators sought to mandate the said city to refund certain taxes alleged to have been wrongfully collected. The relators were a widow and two unmarried, minor daughters. They had inherited from their deceased father certain real estate, and upon the realty had paid taxes for sundry years, which they alleged were unlawfully assessed by reason of the provisions of Section 7, of the Act of December 21, 1872. (Acts 1872, p. 57.)

It was an act entitled, "An Act to provide for a uniform assessment of property, and for the collection and return of taxes thereon." The Act is long, being in forty-eight sections, and undertook to set out a complete scheme or system for the asssessment of property for taxation. We cannot set it all out, but beg the court to examine it. Section 7 of the law provided that:

> "The following property shall be exempt from taxation: * * * Eighth—The property, to

> the amount of five hundred dollars, of a widow or unmarried female, or of any female minor whose father is deceased, if her whole estate, real and personal, not otherwise exempted from taxation, does not exceed in value the sum of one thousand dollars.

The court says, page 376 of the opinion:

> "The appellants insist that the facts averred in the affidavit bring the case within the clause cited, and that the writ of mandate is the proper remedy. We do not now nicely examine these questions, as there is a question underlying the controversy which must first be settled.
>
> "Had the General Assembly of the State of Indiana the constitutional power to enact the eighth clause of Section 7, as above quoted?"

Then follows the constitutional provision under discussion in this case, and the opinion of the court holding the law unconstitutional. We cannot burden the court with long quotations from it, but it seems to us to settle this case, and so the Circuit Court of Marion County thought and held. It contains the best discussion of this constitutional provision in our reports, and has continued to be the law since, and no Legislature, from 1872 to 1899, had the temerity to attempt to further trespass against this plain constitutional provision, and this interpretation of it. Its reasoning is unanswerable, and its conclusions are plain. It cites many authorities, and is conclusive of the whole question.

The same question arose again in the case of Warner et al. v. Curran, 75 Ind. 309.

The appellee, Curran, bought certain lots described, at tax sale, and brought suit, after obtaining a tax deed from the Auditor, to foreclose his tax claims on the lots. The defendants demurred, but Curran obtained judgment for his tax claims, and a decree for the sale of the lots to pay his claims. The appellants appealed, and sought reversal on the ground that three of them were infants, and the owners of one-half of the realty, as the descendants of one Luzern Warner; that they were unmarried females, under twenty-one years of age, not owning property exceeding five hundred dollars in value, and their property was therefore claimed to be exempt, under the same law discussed in State ex rel. Tieman v. City of Indianapolis, supra. This was the burden of their answer, and the court again held the law unconstitutional, saying:

> "It was held by this court, and, we think, correctly so, that this eighth clause of Section 7 of the assessment law of December 21, 1872, was unconstitutional and void." (Opinion, p. 312.)

Thus the court emphasized and reaffirmed its former opinion.

This same question was again decided adversely to the position of the Attorney-General and the State in the case of

> People v. Eddy, 43 Cal. 431.
> 13 Am. Rep., p. 143.

The case was an action for the recovery of taxes which were assessed upon certain solvent debts due to the defendant on certain promissory notes, which were secured by mortgage upon real estate. There was a demurrer to the complaint, and the court says, in the opinion:

> "The demurrer presents the question of the constitutionality of the Act of April 1, 1870, entitled, 'An Act to prevent double taxation,' Cal. Stats. 1869-1870, page 584."

The constitutional provision, as set forth in the opinion, is as follows, being Section 13, Article II of the Constitution of California:

> "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

The law passed by the Legislature provided that "no mortgage or lien, given or held upon real estate, or the debts thereby secured, or promissory notes secured by a mortgage, shall be assessed upon the books of any Assessor, State, county or otherwise." The court, passing upon the constitutionality of the Act of the Legislature, held that where the State constitution provided that "all property in the State shall be taxed in proportion to its value," "an Act exempting mortgages, and debts secured by mortgage, from taxation was in violation of the Constitution and void."

The first section of the Act was the one which was in question in the case, and the court said (Opinion p. 144):

> "That the purpose of the first section of the act was to exempt from taxation solvent debts secured by mortgages upon real estate is, we think, beyond all question. An ingenious argument is presented by the appellant to show that such is not the purpose of the act—that it was merely to regulate the duties of assessors. It is insisted—and correctly so—that it is within the power and is the duty of the Legislature to prescribe the mode in which all property shall be assessed; and it is claimed that this Act is only a legitimate exercise of such power. But the argument is merely specious. Looking beyond the mere words of the Act—the shadow—it is seen that the Act, if enforced, effectually prevents the taxation of debts secured by mortgage upon real estate. And this is the direct effect, as we have no doubt it was the purpose of the Act. If the Constitution requires this property to be taxed, the Legislature, under the guise of regulating the duties of assessors, can no more exempt it from taxation than they could accomplish the same result by providing that the collector should return to the taxpayer the amount collected on such property, under the pretense of regulating the duties of tax collectors. The manifest purpose of the Act is to exempt such property from taxation. Its true features are quite apparent, notwithstanding its attempted disguise."

So here, the learned Attorney-General can argue as much as he pleases that this is a deduction and not an ex-

emption, but, just as the court says in the California case above quoted, the effect of the law was to exempt a vast amount of property from taxation, and the effect cannot be avoided under the specious argument that it is a deduction, lawful in form, but the real intention of it was, as in the Act in question in this case, to relieve the mortgage debtor from a certain portion of taxation against the mortgaged property; and especially is this true, in view of the fact that there is no provision whatever in the law taxing the deduction against any other person or persons in any other county or counties. To call it a deduction instead of an exemption is but a transparent fraud, whereby the learned counsel for the State seeks to maintain the law under the guise of specious argument that it is a deduction and not an exemption.

This is truly a case where, by the mere process of subtracting, as the State's Attorney says, the subtrahend from the minuend, an enforced appraisement of the property is obtained, arbitrarily, and upon the amount obtained by this new method of assessment, as provided by the law, and in the words of the law, the tax is then levied at a certain rate. We can not, of course, quote this opinion at greater length, but a reading of it will show to the court that it is decisive of the whole question, and quite as decisive as the cases from Indiana heretofore quoted from.

Another case which decides the same question upon the same principles, and in the same way, is the case of Hogg, Receiver of R. R. Co., v. Mackay, Sheriff, 19 L. R. A. p. 177; also in 31 Pac. R., p. 779; and 23 Ore., p. 339.

It is an Oregon case, and the Attorney-General has most carefully called the attention of the court to the fact that the Oregon Constitution is an exact copy of the Constitution of the State of Indiana. This is not true of the Oregon law, which we shall take up and discuss later, but it is true of the Constitution. The constitutional provisions of Oregon and Indiana are identical.

In this case the Legislature of Oregon passed a law which was entitled: "An Act to provide for the construction of the Willamette Valley & Coast Railroad," which Act was approved October 24, 1874 (Oregon Laws, 1874, p. 51), as extended by the Act approved February 5, 1885 (Oregon Laws, 1885, p. 77), and which read as follows:

> "Section 11. That if said Willamette Valley & Coast Railroad Company shall, within ninety days after the approval hereof by the Governor, file in the office of the Secretary of State its agreement, duly executed under its corporate seal, obliging itself to carry all troops and munitions of war of this State required to be conveyed on its road without charge to the State for a period of twenty years from and after such approval, without other compensation than the moneys arising from taxes assessed, levied or collected on the property of said company, then, in consideration of said agreement and said services, done, or to be done, for said period of twenty years, said company shall have and receive during all said term, all the taxes levied, assessed or collected, or which might have been levied or collected, by the State, upon all its property, real and personal, and said taxes are hereby appropriated therefor."

And the contention was that this section was in violation of the provisions of the Constitution of the State, that "all taxation shall be equal and uniform," and that the Legislature "shall provide by law for uniform and equal rate of assessment and taxation," etc., exactly as provided in our constitutional provisions.

The court then says:

> "The power of taxation and the right to prescribe what property shall be taxed is a sovereign right, belonging to the State in its sovereign capacity, and, in the absence of a constitutional restriction, necessarily implies the power to prescribe what property shall be exempt from taxation; and hence it has been held that, when not prohibited by the State Constitution, the Legislature can bind the State, by a contract with either an individual or corporation, to surrender the right of taxation, by the grant of either a perpetual or transient immunity from taxation," etc.

Then the court goes on to say that whatever the powers of the Legislature might be in the absence of a constitutional provision, the constitutional provision existing in Oregon (and being the same constitution that we have in Indiana), that

> "The provisions of the Constitution are mandatory that all taxation shall be equal and uniform, and the Legislature shall prescribe regulations for a just valuation of all property for taxation, excepting only the enumerated classes. The language of the Constitution is plain, simple, and easily under-

stood, and manifestly operates as an absolute inhibition against the exemption, either directly or indirectly, of any property from taxation except that specifically enumerated."

The court cites in support of this:

Huntington v. Worthen, 120 U. S. 97;
Crawford v. Linn Co., 11 Ore. 494;
Chesapeake & O. R. R. Co. v. Miller, 19 W. Va. 408;
Zanesville v. Richards, 5 O. St. 589;
People v. McCreery, 34 Cal. 432;
Fletcher v. Oliver, 25 Ark. 289;
Nashville & K. R. R. Co. v. Wilson Co., 89 Tenn. 597.

The decree of the lower court holding the Act constitutional was reversed. We request the court to read the case carefully, as it also is decisive of the entire question in this case.

The case of Barber, Sheriff, v. Louisville Board of Trade, 82 Ky. 645, decides the same question in the same way. In this case, the Louisville Board of Trade was incorporated March 15, 1862, under a charter granted by the Legislature. On April 23, 1873, the charter was amended as follows:

"Any real estate held by the Louisville Board of Trade in the City of Louisville, by purchase in fee simple, not exceeding one hundred by two hundred feet in area, and any improvements thereon, shall be, and are hereby exempted from all State taxes, so long as said property shall be occupied by

> said Board of Trade for the purpose contemplated in its organization. And the general council of the city of Louisville is authorized to exempt such property so held and occupied from all taxes to be levied by said general council of said city of Louisville."

Under this Act the Board of Trade was organized in 1879, and purchased real estate in Louisville. The sheriff brought an action to enforce the collection of taxes against the real estate, and it was defended on the ground that the charter provisions exempted the Board from the payment thereof. The lower court found in favor of the Board. The court states the question as follows: (Opinion, p. 648.)

> "The question presented on the appeal is whether the property of the Board of Trade is exempt from State taxation by reason of the Act of 1873, quoted. This involves the inquiry as to whether that Act is constitutional."

The court discusses the general powers of governments in the absence of a constitutional restriction, and holds, in the opinion, that, even in the absence of a constitutional restriction, this charter provision is a violation of the common law. It further holds that the provision is in violation of the 28th Section of the 13th Article of the Kentucky Constitution, which provides:

> "That the General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than for a term of years."

The court says, in its opinion, page 651:

> "Whatever difference of opinion there may be as to whether the first section of the Thirteenth Article of the Constitution applies in restraint of the grant of privileges as directly presented between individuals, there can be no doubt that this provision is a restriction upon the exercise of the taxing power. It is certainly a 'public privilege' to be exempt from taxation. The exercise of such power is purely an act of sovereignty. Independently of any constitutional provision, the surrender of such an element of sovereignty is never to be presumed. Every intendment is against it so strongly that a reasonable doubt of the legislative intention to surrender or limit must be solved against such intention. Uniformity and equality of taxation is the essence of the power, and an exception in one case is the increase of the burden of taxation upon others not thus favored."

And the conclusion of the court is that the charter provision in question was unconstitutional, and the opinion of the lower court was reversed.

The case of Jones v. Mayor and Aldermen of City of Little Rock, 25 Ark., page 289, also decides this question adversely to the position of the State. In this case one Fletcher, on behalf of himself and the other taxpayers of the city of Little Rock, filed his bill for injunction against Oliver, sheriff, and ex-officio collector of taxes, to enjoin him from attempting to collect a certain road tax assessed and levied by the county of Pulaski, on the property of the said county lying in the limits of the city of Little Rock.

The law under which it was claimed that their property was exempt from the road tax in question reads as follows:

> "The inhabitants of Little Rock are hereby exempted from working on any road beyond the limits of the city, and from paying any tax to procure laborers to work upon the same."

The provision of Article X, Section 2, of the Arkansas Constitution was as follows:

> "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, general stock companies, or otherwise, and also all real and personal property, according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property, property used exclusively for public purposes, shall never be taxed; * * * but the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each taxpayer."

The complaint alleged that the provision of the law exempted the complainant and all other inhabitants of the city from paying the tax, and the court says that it becomes its duty "to inquire whether there is any conflict between this clause of the law and that provision of the Constitution." The lower court held against the complainant, and the Appellate Court affirms the decision.

The reasoning of the court is most excellent, and we desire particularly, by reason of the fact that we have already

argued that question, to call the attention of the court to this particular feature of the decision which we quote:

> "Taxing by uniform rule means by one and the same unvarying standard; uniformity not only in the rate of taxation, but uniformity in the mode of assessment by which the value is ascertained. There must be an equality of burden."

We call attention to this portion of the decision particularly, for the reason that in our previous discussion of this case we have already carefully pointed out that the valuation by the Assessor is the basis of taxation in the case of every one whose real estate and property is not incumbered by mortgage, but that this law which is in question in this case specifically provides that in the event there is a mortgage upon the real estate, seven hundred dollars, or one-half of the appraised value, shall be deducted from the assessed value, and that the sum obtained by the "subtraction of the subtrahend from the minuend shall constitute a new basis of assessment." Thus we have, as we have already clearly shown, two methods of assessment, which this opinion says is a violation of the law of uniformity. We can not quote further from this interesting case, but we hope the court will find it possible to read the instructive opinion and unanswerable reasoning of the court.

The case of Life Association of America v. Board of Assessors of St. Louis County, 49 Mo. 512, again decides this question.

In that case the Assessors of St. Louis County assessed the appellant two hundred and ninety-four thousand dollars on its property. To obtain relief from the payment of the tax the suit was brought, and on the trial the assessment was sustained.

The appellant was an association organized on the mutual plan for the assurance of lives, and it was claimed that, by the State law (Wagn. Statutes, 752, Section 40), such insurance companies were exempt from taxes. This section provided that such insurance companies shall pay certain fees for the support of the insurance department, and which "shall be in lieu of all taxes, fees, and licenses whatsoever," etc. It further provided that all such companies "shall pay all fees required in this section, which shall be in lieu of all fees or taxes whatsoever, except that they may be taxed upon their paid-up capital stock, in the same manner as other property in the county, for county and municipal purposes.

There were two provisions in the Missouri Constitution, the first of which (Article I, Section 30), provided that "all property subject to taxation except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State."

The law was held unconstitutional. The special feature of the case to which we desire to call the court's attention is that portion of it in which the plaintiff contended that "although the Legislature may not have power to exempt property from taxation, it has power to commute taxes,"

etc. Just as here, the Attorney-General claims that this law only "deducts," but does not exempt. The court held adversely to that contention, and that the law in question was an exemption and therefore unconstitutional. The opinion shows the fallacy of such arguments.

The State v. Lautz, 53 Md. 578, also incidentally decides this case, in that it holds the Act deducting mortgage indebtedness in that State does not apply to mortgages which can not be taxed to others. But there is no such exception in the law of this State by which the court could accomplish this. Our law covers all mortgage indebtedness, whether the security is taxable property or not, and whether the mortgagee be resident or nonresident, and has no provision requiring the taxation of the mortgage security against the mortgagee anywhere.

The general rule of law is, that the State has no power to tax mortgages held by nonresidents, at the locus of the mortgaged property.

> Foresman v. Byrnes, 68 Ind. 247;
> Senour, Treas., v. Ruth, 140 Ind. 318;
> Holland v. The Comrs., etc., 27 L. R. A. 797;
> Cooley on Taxation, pp. 21-22.

Mortgage indebtedness held by a nonresident mortgagee, on every legal principle must be taxed at the place of his residence.

> Murray v. Charleston, 96 U. S. 432;
> State v. Earl, 1 Nev. 397;
> Myers v. Seaberger, 45 O. St. 232;
> Arapahoe Co. Comrs. v. Cutter, 3 Colo. 350;
> People v. Eastman, 25 Cal. 621.

A debt, for purposes of taxation, is situated at the domicile of the creditor, although secured by mortgage upon real estate situated in another State. This is the general rule.

Ex parte Clark, 100 U. S. 401;
State Tax on Foreign Held Bonds, 82 U. S. 15;
Eells v. Holder, 12 Fed. Rep. 668;
San Francisco v. Mackey, 22 Fed. Rep. 602;
Cooley on Taxation, 63;
1 Desty on Taxation, p. 62;
Foresman v. Byrnes, 68 Ind. 247;
Senour, Treas., v. Ruth, 140 Ind. 318;
Baltimore v. Hussey, 67 Md. 112;
State v. Vansyckle, 49 N. J. L. 366;
State v. Darcy, 2 L. R. A. 350; 51 N. J. L. 140;
Bradley v. Bauder, 36 O. St. 28;
Grant v. Jones, 39 O. St. 506;
Worthington v. Sebastian, 25 O. St. 1;
Holland v. Comrs., etc., 27 L. R. A. 797;
St. Paul v. Merritt, 7 Minn. 258;
Liverpool, etc., v. Board, 44 La. An. 760;
Goldgart v. People, 106 Ill. 25;
People v. Eastman, 25 Cal. 603;
People v. Smith, 88 N. Y. 577;
Territory v. Del. Tax List, 24 Pac. Rep. 182 (Arizona);
Com. v. Chesapeake & O. Ry. Co., 27 Gratt. 344.

So far as we know, and so far as the industry of the Attorney-General has led us to believe, there are but two

exceptions; one is the State of Michigan, and the other is the State of Oregon. In each of these States, however, there is a special statute which provides that, for purposes of taxation, real estate mortgages shall be held to be realty, and partake of the character of realty, and, therefore, may be assessed in the State even against non-residents. Both States have this peculiar law.

The question of what should be the law in a State where such a law is not in force arose in the Montana Supreme Court, and the question was decided on March 11, 1895, in the case of Holland v. Comrs. of Silver Bow County, reported in 27 L. R. A., at page 797. There the court was confronted with exactly the question that the State raises in this case, that both the State of Michigan and the State of Oregon had held that the law was constitutional, and yet, the court decides the proposition under the general law. We quote from the decision, as it is clearly decisive of this whole case.

The court goes on to say, in the opinion, that the opinion of Justice Field to the effect that mortgages are taxable at the residence of the holder thereof has been generally approved all over the country, and that such property has, for taxation, "no situs independent of the domicile of the owner." Then the court takes up the case of Detroit v. Detroit Board of Assessors, 91 Mich. 78, which has been cited by the attorneys in the case, and which had decided that the law of Michigan taxing mortgages owned by non-residents was not unconstitutional, and says:

"The statute of that State, however, expressly provided that any 'mortgage by which a debt is secured, when land within this State is pledged * * * shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the land so pledged.' The court held that the Legislature could give a situs to mortgages where the land was situated, treating them as interests in realty, though held by nonresidents. In distinguishing the case from the State tax decision, supra, the court says that the statute of Michigan 'imposes a tax upon an interest in real estate as such,' while the decision of the Supreme Court of the United States was that a tax could not be imposed upon the bond itself, which had a situs at the domicile of its owner. A careful examination, therefore, of the Michigan case, demonstrates that the Legislature, in the opinion of the court, had the power 'to fix the situs for the purpose of taxation at the place of the location of the property mortgaged,' and that real estate mortgages, for the purpose of taxation, could be treated as interests in lands. The Oregon cases cited recognize a statute of that State similar to that of Michigan, and uphold its constitutionality. But until the Legislature passes such a law in Montana it is unnecessary to inquire into its validity, for we are of opinion that in the Revenue Law of 1891 there is no provision giving a situs to mortgages owned by nonresidents as property within the State. The general rule must, therefore, control, and the case be determined adversely to plaintiff."

The above quotation states the case in a nut shell, and is to the effect that so long as there is no such statute in any State as the statute in Michigan and Oregon, the general law or rule controls. We need hardly say that there is no such statute in Indiana. Not only is there no provision in this law that, for the purposes of taxation, real estate mortgages shall be held to be realty, but there is no provision in this law which requires the placing of the amount of seven hundred dollars which is deducted, or of any other amount, either against the local holder of the mortgage, or against the nonresident.

Thus, even on the theory of the State itself, the Montana court, considering this very proposition, has held that in the absence of a statute like the statute of Michigan and Oregon, the general rule controls. This is the situation in Indiana. We shall come, later, to a more particular discussion of the statute laws of the States of Michigan and Oregon. The State of Michigan has, as we are informed, since been relieved of this troublesome question by the wisdom of the Legislature which repealed the law.

The State of Indiana has distinctly decided for the general rule, in the cases of

Foresman v. Byrnes, 68 Ind. 248; and
Senour, Treas., v. Ruth, 140 Ind. 318.

5. STATE'S BRIEFS AND AUTHORITIES.

The State having filed its briefs setting forth its position, in the previous litigation in this case, we desire to discuss, for a few moments, its former position relative to the issues in the cause.

It is amusing, sometimes, to see how ingenious counsel contrive ways to avoid the effects of the Act when they are seeking to sustain its constitutionality. The State in its brief sought to avoid the proposition that this is an exemption law, and claimed that it was not an exemption, but a deduction, and that deductions are constitutional. Yet, the compiler of the statutes, an able and experienced man who has been, for years, in the business of compiling statutes in Indiana, and who happened to issue a new edition of the statutes of 1901, and who was called upon to place this new Act in its proper place in the statutes, instantly placed it under Article X of the Tax Law, the heading of which is, "What Exempted," and there it appears as Sections 8417a, b, c and d. It is curious how great men will differ. There he thought it belonged; and there it does belong. But ingenious counsel, hunting for a means to sustain this unusual law, and seeing no possible way to defend it as an exemption, undertakes to claim that it is a deduction. The court, as we have heretofore shown in a quotation made from the majority opinion in this cause, says that the law can not be sustained, for a moment, as an exemption law.

In its former briefs the State set out what it called the deduction laws of other States, we suppose on the theory that this law was a law of like character. In their previous briefs counsel cited what they called the deduction laws from fourteen States. These several so-called deduction laws of the different States take many various forms, but, after all, are substantially alike in their provisions. The State, in its brief filed in the Supreme Court

in this cause, said: "Nearly every State in the Union deducts indebtedness, either from credits, personal property, or real estate, or all of them."

As a mere illustration of the laws from which they argue that this law is constitutional, they cite first the law of Connecticut, and we shall discuss this law for a moment, for the pure purpose of showing the difference between the acts they cite and the law in question in this case. We take the first one, because it illustrates, as well as the balance of them, the peculiar differences between this Act and those of other States. It reads:

> "If any resident in any town shall be indebted to another resident in this State, in such manner that the debt is liable to be assessed by the State in the list of the creditor, * * * the Board * * * shall * * * deduct the amount thereof from the list of such debtor, and add the same to the list of the creditor."

Notice the peculiarities of the law:

> (1) The debt to be deducted must be to another resident in the State;
>
> (2) It must be such a debt as is liable to be assessed by the State in the list of the creditor; and
>
> (3) It is therefore provided that the amount deducted shall be added to the creditor's list.

Not one of the above features is in the Indiana law. These are the features that make such a law equitable. It is called a deduction law. There is, in fact, no deduction,

but a mere transfer of the debt from one person to another for taxation. The so-called deduction is allowed:

(a) Only on debts due to other residents of the State;

(b) And the debt must be such a debt as is liable to be assessed by the State in the creditor's list; and

(c) At the moment of the deduction from the debtor it must be added to the creditor.

By this law nothing is exempted or escapes taxation; it is a mere transfer from one person to another of the debt, not a deduction at all. If the debt be to a non-resident, or is a debt not liable to be assessed to the creditor in the State, it can not be deducted or transferred. But our law has no such equitable provision. Its every sentence is but a means to take property off the tax duplicate. This Connecticut law thus exempts nothing. What it takes from one it adds to the other. It takes all the debt from one and adds it all to the other, thus preserving ratio, equality and uniformity, and nothing is lost to taxation. Is the fact that such a law is held constitutional any argument that our law is constitutional, when our law has no one of the above features of the Connecticut law? Certainly not. The mind that can see any argument to sustain our law in the above law and the holding of the Connecticut courts upon it, must be gifted with second sight. The remaining features of the Connecticut law are of like character, and we do not stop to further discuss it. It is plainly no precedent to sustain the Indiana law.

The State, in the several briefs which have been filed in this cause, has argued at great length concerning the Oregon law. We quote this law, also, by reason of the fact that the State has laid so much stress upon the matter. It must be borne in mind, also, that the Oregon Constitution is an exact copy, on the question of taxation, of the Indiana Constitution; that is, it has as a section Section 1, Article X of the Indiana Constitution, involved in this cause. The law is as follows:

> "Section 2752. * * * It shall be the duty of the Assessor to deduct the amount of indebtedness within the State, of any person assessed, from the amount of his or her taxable property, but no such indebtedness shall in any case be deducted unless it be real, bona fide indebtedness due from the person assessed as principal debtor, and not on account of any contingent liability as surety, endorser or otherwise."
>
> Oregon Annotated Statutes (2d Ed., 1892).

It is instantly noticeable, on reading this section, that the Assessor may deduct,

> (1) Only indebtedness in the State; and
>
> (2) That it is the indebtedness that is deducted; that is, all of it, and not a fixed portion like seven hundred dollars.

But one further thing appears, by quoting the law a little farther, which the State neglected to do in its brief. It will be found that the above section stands in a general

law concerning taxation, and that a little farther along in the law is the following section:

> "Section 2757. Nothing in the foregoing shall be construed to apply to mortgages, deeds of trust, contracts, or other obligations in favor of the State, or the Board of Commissioners for the sale of school or university lands, or judgments in favor of the State or any of its educational funds."

Thus it will be seen that the Oregon law has none of the faults of the Indiana law. We quote only a portion of the statute, although the balance of it is quite as relevant to the matter in hand, but this is the portion which particularly exempts all State funds from the operation of the so-called deduction or exemption law. It is one of the very things that we have complained of in relation to this law in Indiana, and yet, we see that every time we come in contact with one of these so-called deduction or exemption laws it has in it provisions guarding against the very faults of the Indiana law. Just like the Connecticut law, it exempts only such debts as can be transferred to the list of another man, and over which other man the State has authority and control by reason of the fact that he is a resident. It also excludes from the deduction or exemption features all obligations due to the State, or any State or educational funds, like our school fund. These laws are, therefore, no criterion by which to adjudge the constitutionality of the Indiana statute, for the reason that they have provisions in them for all of the objections which have been made to the Indiana law. Any authorities, therefore, holding them

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constitutional have little weight or force as applied to the Indiana statute, which lacks all the features of their law.

One thing more in regard to the effects of this law. It is well known that building association mortgages have been held to be nontaxable to the corporation, in Indiana. The building association secretaries are kept busy, every tax year, making calculations and giving the amounts to their mortgage debtors for exemption purposes, under this law, and yet, not one of all the building association mortgages all over the State is taxed to the corporation, and the effect of this law is, also, to exempt seven hundred dollars of the mortgage indebtedness of every mortgage to the building associations all over the State. Add this amount, also, to the forty millons of deductions which the Attorney-General admits escapes taxation every year by this law, and the effect of this law is to add an additional forty millions; so that, instead of fighting for this law, he should be assisting us to have it declared unconstitutional.

As we have heretofore said, the industry of the Attorney-General was able to turn up these deduction laws in only fourteen States. These States are Connecticut, New Jersey, New York, Michigan, Illinois, Iowa, Oregon, Kansas, Minnesota, Nebraska, North Dakota, South Dakota, California and Washington. Of these, Connecticut, New Jersey and Oregon exempt only debts due to creditors in the State. All, except Michigan and Oregon, deduct only from credits, if this may be called a deduction, at all. Most of them, as we have heretofore shown, amount to mere

transfer laws, transferring the amount of taxes or assessment from one person to another, and never affecting the gross amount of the taxes or the income of the State, at all. No one of them, so far as we know, deducts a fixed amount, as the Indiana law does. We very briefly call attention to their provisions.

The Connecticut law, which we have hereinbefore quoted, deducts indebtedness owed to another person in the State, when it can be transferred to the list of the holder of the debt. Is is, therefore, a mere transfer law, and does not take a dollar off the tax duplicate.

Conn. R. S. (1888), Sec. 3854.

The New Jersey law is exactly like the Connecticut law, in every respect, deducting only debts due in the State.

R. S. N. J. (1709-1895), Vol. 3, p. 3298.

Th New York law permits the "deduction of just debts owing," from the total amount of the lists of personal property, excepting "debts or liabilities contracted or incurred in the purchase of nontaxable property."

Birdseye's R. S., 2d Ed., Tax Law, Vol. 3, p. 3094.

The law of Michigan provides that "a mortgage on real estate within this State, for the purposes of assessment and taxation, shall be deemed and treated as an interest in such real estate, * * * *" and the real estate, less the mortgage or the value of it, is all that is taxed or assessed against the owner of the property. That is, all debts are

deducted, and not a fixed and stated amount, and the ratio or rate is not thereby varied.

Mich. Acts of 1893, p. 288.

The State of Illinois permits the deduction from "the gross amount of credits the amount of all bona fide debts."

Starr & Curtis' An. Stats. (1896), Chap. 120, par. 27.

The Iowa code provides that the taxpayer "shall be entitled to deduct from the actual value" of his list of credits "the gross amount of all debts."

Iowa Code (1897).

The Oregon statute we have already quoted at length and referred to. It deducts all indebtedness.

Ore. An. Stats., 2d Ed. (1892), Sec. 2752.

The law of the State of Kansas provides that "debts * * * may be deducted from the gross amount of credits."

Kans. Stats. (1899), Sec. 7165.

The law of the State of Minnesota provides that after making up the list of credits the taxpayer "shall be entitled to deduct from such gross amount the amount of all bona fide indebtedness."

Minn. Stats. (1894), Sec. 1526.

The law of the State of Nebraska provides that from the list of credits the taxpayer "shall be entitled to deduct

from the gross amount of the credits the amount of all bona fide debts owing by such person."

Neb. Stats. (1901), Sec. 4308.

The law of North Dakota provides that the taxpayer "shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing * * *."

N. Dak. Stats. (1887), Sec. 1543, clause 6.

The law of South Dakota provides that from the list of credits the taxpayer "shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person."

S. Dak. R. S. (1899), Sec. 2135.

The law of California provides for the deduction of all debts.

Deering's Annotated Codes & Stats. (1885), Sec. 3650.

The law of the State of Washington provides that the taxpayer shall "be entitled to deduct from the gross amount (of credits) all debts in good faith owing by him."

Ballinger's Annotated Codes & Stats. (1897), Sec. 1657.

It will thus be noted that debts are permitted to be deducted in toto—that is, all a man's debts—by the provisions of these several laws, and none of them attempt to deduct a fixed and stated amount, and thereby they preserve uniformity of ratio, and uniformity in the method

of assessment; while the Indiana law has one method of assessment for the man without a mortgage upon his property, and another and new basis of assessment, made by another officer, the Auditor, for property upon which there is a mortgage.

The State of Indiana allows no deductions. It used to allow deductions, and the law relating to the same will be found in Section 6332 of the Revised Statutes of 1881, and it is this law which the court had in mind, and which it discussed and held constitutional in the case of Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, to which the Attorney-General gave so much attention in his former briefs in this cause. This case shows, on its face, that it is under the old law. It reads (Opinion, p. 30): "The complaint, in substance, alleges that on the 8th day of February, 1890," etc., showing that the case arose in 1890, under the law of 1881. The new Act on taxation was passed by the Legislature of Indiana in 1891, and will be found in the Acts of 1891, pp. 199 to 291, inclusive. It consists of two hundred and sixty sections, and was a general law covering the entire question of taxation. With the amendments which have been passed to the law since that date by the several Legislatures, and to which we shall refer later, it is the law at this time in Indiana, controlling and governing taxation. Section 259 of the Act repealed all laws within the purview of the Act, including also the Act of March 8, 1889. In other words, it was a new general law, covering the entire subject of taxation.

Section 6332 of the Revised Statutes of 1881, which is also the Act of 1881, disappears from the Revised Statutes; is not published in the revision of 1894, nor in the revision of 1901, and is, undoubtedly, repealed; so that the decision in Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, based upon that law, is no longer an authority, since the law itself has not been the law in Indiana, and the statute which it passed upon has not been in force since 1891. The only statute that we have had since 1891, relating to the question of deductions in any way, is Section 4 of the Act of 1891, which will be found on page 199 of the Acts of 1891, and the amendment to that section which was passed in 1895, and which is now the law, and appears as Section 8411 in the Revised Statutes of 1901.

Section 3 of the Act of 1891, which appears as Section 8410 in the Revised Statutes of 1901, provides:

> "That all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

The next section, which is the one we have heretofore referred to, defines what shall be real estate and what shall be personal property, and says:

> "For the purposes of taxation * * * personal property shall include all goods and chattels within the State * * *; all indebtedness due to inhabitants of this State, above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, or whether such debtors reside within or without the State; * * *."

It will thus be seen that the Indiana law does not tax credits, or allow deductions from the credits, but specifically provides that only the credits above the amount owed shall be subject to taxation. The law, therefore, does not allow deductions of indebtedness from credits, and there is no such thing as deduction of indebtedness from credits in this State. The surplus alone is taxable by the law, and it is not a process of taxing credits and deducting indebtedness, but the law itself specifically provides as to credits that only the excess over indebtedness shall be taxable property. The indebtedness is, therefore, excluded from consideration in the statute, and it is not at all, as we have said, a question of taxing credits and deducting indebtedness.

This is the only construction which will make the law harmonious with Section 3 which preceded it, and which says that all property within the jurisdiction of the State shall be subject to taxation, unless expressly exempted. The Attorney-General says that we confuse deduction with exemption. This argument falls when it appears, as it does from an examination of the statute, that there is no such thing as deduction under the Indiana statute. To his mind this statute presents itself as a deduction rather than as an exemption, but an examination of the Revised Statutes of 1901 will show that Article II thereof, which purports to set out what is "exempted," contains within itself, as Section 8417a, b, c and d, this law as one of the exemptions granted by law. It is placed alongside of United States property, municipal property, charitable property,

churches, cemeteries, and other exempted property, and it seems to us that it would strike every reasonable person, except the ingenious lawyer who wanted an excuse for making it something else, as an exemption. We admire the effort of the Attorney-General to make something else than an exemption of it, because to admit, for one moment, that it is an exemption is to concede the unconstitutionality of the law. But, as the Indiana law no longer allows deductions even from credits, his argument that it is a deduction and not an exemption is fallacious, in the face of the fact that the Indiana law no longer allows deductions from credits, and the statute providing for deductions of indebtedness from credits disappeared from the statutes when the new tax law of 1891 went into force, and has never been a part of it since.

The fact that neither exemption nor deduction exists in Indiana except under this law, makes it unnecessary for us to examine further the several exemption laws referred to by the Attorney-General in his several briefs, holding that deductions are allowable from credits, since this is no longer the law in Indiana, and has not been since 1891. Attention is called, however, to this universal fact, that wherever there is deduction from taxation in these laws there is some provision for the transfer of the amount deducted to the other person, and the limitation, in the most of them, is to creditors who hold claims which may be legally taxed by the State against the creditor. As the laws deduct all indebtedness, also, they do not vary the

rules of uniformity in assessment, and do not make two bases or methods of assessment, as does the Indiana law.

We must, however, call attention further to the fact that each of these laws, and its peculiar provisions in the cases which relate to the same, have been held good, where the Supreme Court has passed upon the matter, under the particular provisions of the State Constitution of that State, and the constitutional provisions in all of these States have varying exceptions, differing from the Constitution of the State of Indiana, and none of the laws, unless it is the Oregon law, which has exactly our constitutional provisions, is strictly in point in the case. The fact that such laws have been held constitutional under the peculiar provisions of the several State Constitutions is no argument in favor of the constitutionality of a law which, by its terms, exempts the value of almost the entire school fund of about twelve million dollars, together with the Congressional fund, all mortgages held by non-residents, and seven hundred dollars of each building association mortgage, from taxation. The State, in its brief, says that the deductions have amounted to over forty million dollars, and if the deduction of the building association mortgages be considered in addition to those referred to, the deductions have probably amounted in Indiana to over eighty million dollars.

We concede that the State is not limited to one method of taxation, provided the method it adopts is in conformity with the constitutional provision. But whatever method it adopts must be in conformity with the Constitu-

tion. The effect of this law is not to relieve one and tax it against another, but it exempts millions of dollars due to nonresidents and to the school fund entirely from all taxation against any one, and this is in the very face of the constitutional provision.

The State has claimed in its briefs that

> "By this law the State, in a small measure, has attempted to relieve the landowner of the tax on a part of his lot or land covered by this mortgage," etc.

This the State perhaps might have done by a proper law, but this law simply does that at the expense of the other taxpayers, and without ratio or uniformity. It would have been better, so far as the legal features are concerned, to have exempted all of the mortgage debt, instead of an arbitrary amount, since the law would then have had the advantage of a ratable and uniform exemption instead of an arbitrary amount as it now has in its present shape. It would have been better had it "gone further," as the State's attorney well says. But it would not then have been constitutional, unless it had provided for the exemption to be taxed against the creditor, and have further prohibited the exemption in the case of foreign-held debt, and nontaxable creditors, like the school fund. The effect of deduction in its present form is to make the other taxpayers pay the bill, since the gross amount of taxes must be enough to pay the public bills, without reference to who pays it.

The State has claimed that the case of Savings and Loan Ass'n v. Multnomah County, 169 U. S. 421, clearly de-

cides this case. It does not, for we have already heretofore shown that the courts have decided (Holland v. Commrs., etc., 27 L. R. A. 797), that this is not the case where no law has been passed by the Legislature making mortgages for taxation real estate. The court, as we have already shown, in that case held that in the absence of such a law as was passed in Oregon and Michigan, the general rule and not the special rule applies. This case, cited in 169 U. S., p. 421, is an Oregon case, under the Oregon statute, where the Legislature had passed the law making mortgages realty for taxation. Indiana has no such law, and, as the court says in Holland v. Commrs., supra, the rule is different where no such law has been passed.

Further, even, this case was not the one before the court. It only decided that a nonresident could, under the Oregon law, be made to pay taxes on its mortgages. It was held that the law having been passed, making the mortgages realty for taxation, the nonresident, in a case where such a law had been passed, could be made to pay the taxes; but there is no exemption feature similar to the one in the case at bar passed upon at all. And even this case was decided by a divided court, Justices Harlan and White dissenting. It does not decide the point at issue in this case, since it was a case between the nonresident mortgage holder and the county for the collection of the taxes, and not one at all between the owner of the land and the county over the deductions or exemptions. So that even if the court had decided our question in that case, it would be mere dicta, since our question was not the issue in the cause. The court says in the case (Opinion, p. 425):

> "The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and nonresident mortgagees, as to deny the latter the equal protection of the laws."

This is said of the Oregon law, but the same can not be said of our law. We have already shown how it does discriminate between all parties, how it differs from the Oregon law, and how it violates the constitutional provision.

The court says (Opinion, p. 426):

> "The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of States and in their possession outside of the State of Oregon, deprives them of their property without due process of law."

That is the only question in that case, and it is not our question here at all. Indiana has no law taxing the mortgages held by nonresidents to them, as Oregon has. But the amount of such mortgages, under our law, is simply lost to taxation; every other taxpayer is thus discriminated against, since he must pay so much more taxes to foot the amount of the public bills.

The State's briefs said of this law:

> "We have charged the mortgagee with the full value of the mortgage, and have charged the mortgagor the full value of the land, less a maximum of $700."

That may have been what was intended to be done by this law, but clearly that is not what has been done. To whom is taxed the amount deducted for school fund mortgages and mortgages held by building associations and nonresidents? Let the State answer these questions if it can.

Then the State said:

> "The Supreme Court of Oregon has frequently been called upon to pass on the validity of its law * * * and a few of the cases will be cited."

The first one cited and quoted from, as sustaining the validity of the law, is Wetmore v. Multnomah Co., 6 Ore. 463, but the court, in the opinion in that case, says:

> "The question which counsel for appellant argued so exhaustively can not be considered in this proceeding; it could only arise and be presented if the Assessor had refused to allow a deduction for indebtedness within the State. Then, perhaps, we could consider the numerous constitutional questions presented in this argument."

So, then, the court in this case did not, as the State's brief claimed, pass upon the validity of the Oregon law therein. The State is mistaken; the court in the opinion says so. It is just as far wrong in the remainder of its citations.

The State next cited Crawford v. Linn Co., 110 Ore. 482. Another case under Oregon's peculiar law which we have already discussed and distinguished from ours. And

from this opinion it appears that (Opinion, p. 48) the U. S. District Court of Oregon, in March, 1884, in the case of Dundee, etc., Mortgage Co. v. School District, held the Act "unconstitutional and void" on two grounds: "first, because it does not provide for equal and uniform taxation, and second, because it is a special law."

The question in this latter case is whether the law is unconstitutional in its different provisions for what are known as "one county" and "two county" mortgages. The law provided for the deduction of the mortgage indebtedness from the valuation of the land where all the land lies in "one county," but prohibits deduction where the land mortgaged lies in "two counties," part in each, and the only question raised in the case is the constitutionality of the law by reason of these "one county" and "two county" provisions, and the case only passes on the constitutionality of the law as to these provisions. We have no such question in the case at bar, and the case decides nothing relating to our question.

The case of Talcott v. Glastonbury, 64 Conn. 575, was next cited by the State as an authority. We have, heretofore in this brief, discussed the Connecticut law, and pointed out its peculiar features and provisions, and have shown how radically it differs from the Indiana law, which has not a single feature of the Connecticut law. We must ask the court to recall that portion of this brief. But in this case one of the features of this law was that when a mortgage on property was executed, a tax of one per cent. on the face amount of the note might be paid in ad-

vance, for the term of five years, and, when so paid, the Treasurer should indorse the exemption from taxation upon the note for the term. That was done in this case. The statutes are quoted (Opinion, p. 576). It will be noted, too, that the court, and all persons, including the law, call this an "exemption," and not a "deduction." The town authorities insisted upon taxing the debt again, notwithstanding the tax had been paid five years in advance, and was exempted, and was duly exhibited to the officials, and the court only holds that the tax having been paid they could not tax it again. The debtor was entitled to exemption. The tax had been paid. The creditor was a resident, and only claimed exemption because the tax was paid. There was no constitutional question like ours in the case at all. It also appears that such exemptions and special contracts for taxation are lawful under the Connecticut Constitution.

They also cited Hall v. Bain, 18 R. I. 413. It has no constitutional question in it, either directly or indirectly discussed. The plaintiff, under protest, paid illegal taxes charged against him. He sued to recover it. The lower court held against him on an agreed statement of facts. The Appellate Court reversed the decision. The court says (Opinion, p. 415):

> "The case was argued on the part of the defendant as if it was one merely of over-taxation, and it was contended that the plaintiff was without remedy," * * * but it is one of illegal taxation as well."

Therefore they gave judgment against the city for the overcharge. The constitutionality of the law was in no way in issue. It was tried on the general issue, without demurrer, or any question of law being raised. It was entirely a question of fact.

They cite State v. Runyon, 41 N. J. L. 98. The New Jersey statute, which is set forth in the opinion (p. 100), provides that:

> "No mortgage or debt secured thereby shall be assessed for taxation, unless a deduction therefor shall have been claimed by the owner of the land, and allowed by the Assessor."

Not the Auditor, as in our law. Another section provides, just as the Connecticut law did:

> "That such mortgages or debts secured thereby as shall be subject to taxation, shall be assessed for taxation by the Assessor, making the deduction on account thereof, and the tax collected."

The law, in other words, limits the deduction feature both to residents, and to "debts which are taxable against the creditor," both of which features we have already shown are wanting in our law. The court says in the opinion (p. 101), that if the holder of the debt lives in another State, "the deduction of the mortgage debt from the gross amount * * * of estate * * * would be impracticable." That is the case of our Indiana law. If the State can get any support in this case from such a holding, it is welcome to it.

The court says, of the constitutional provision (Opinion, p. 104), that it only provides that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value," and that in all other "respects, the legislative power over taxation was left unimpaired." This means that there are no restrictions on taxation or exemption in the New Jersey Constitution, and in such a case, as we have already shown, the power of exemption is unlimited. In other words, having no constitutional restriction, as we have, the Legislature could pass any law it desired, if the law be "general" and the rule "uniform." In the absence of a constitutional restriction the case is no authority in a case where there is a restriction, as there is in Indiana. It is too plain to spend further time upon.

Next after New Jersey, the State refers us to New York State, and cites four authorities. It quoted the statute which we referred to in its brief. The most cursory reading of the four cases cited will show that they decide no question under the law quoted, or which relates to the question in this case. Not one of the cases, except the 155th New York case, even refers to this question. Examine them a moment.

People v. Barker, 147 N. Y. 31, cited in the brief, was a case brought by the relators to review the action of the authorities in assessing them under that section which provided that "all persons and associations doing business in the State of New York as merchants, bankers or otherwise, * * * and not residents of this State, shall be assessed and taxed," etc. The only question in the

case was whether a nonresident could be taxed. The court says in the opinion (p. 38):

> "The question is as to the true construction to be given those words of the statute which provide that all persons nonresidents of the State and doing business herein, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this State."

This is not our question at all, and we do not see why the case was cited.

The case of People v. McLain, 80 N. Y. 254, has less relevancy to the issue than the case last above discussed, if that be possible. It was a question of where the relator should be assessed, in Ossining, Winchester County, New York, or in New York City. The relator was a Massachusetts corporation, working prison contracts at Sing Sing. The court holds that they should have been assessed in New York City, instead of at Ossining, and this is the only question in the case.

The case of McLean v. Jephson, 123 N. Y. 142, also cited by the State, has just as little relevancy to our case as the two cases above discussed. The issue was over the same section above referred to, taxing nonresidents with a business in New York State. The court says plainly, in the opinion, that this is the question, and the case does not touch or discuss the question at issue in the case at bar. It is utterly irrelevant.

The only other case cited is People v. Barker, 155 N. Y. 330. In that case the only question is one of the amount of the deduction; whether certain debts for non-taxable property shall be deducted when the property had already been deducted. No constitutional question as to the law is anywhere raised or discussed, at all. It does, on the other hand, call these deductions "exemptions," and says that they are allowable under the New York Constitution. In other words, the New York Constitution is without restrictions. We have already discussed the law in such a case, and need not repeat it. Hence the New York citations are not authorities in our question.

The next case cited was Fuller v. Kane, 110 Mich. 549. We have already called attention to the Michigan law, which, like the Oregon law, makes mortgages real estate for the purposes of taxation, it being one of two States wherein that law has passed. The case cited by the State, however, contains no constitutional question whatever. It was a contest over who paid the taxes, the mortgagor or the mortgagee. It is plainly stated in the case that,

> "Prior to 1891 mortgages were assessed against the mortgagee, and the real estate was assessed against the owner. By the Act of 1891 the Legislature provided for the assessment of mortgages as an interest in the land, and relieved the mortgagor from taxation on so much of his property as the mortgagee's interest represented. Prior to the enactment of the law, in October of 1889, the defendant executed a mortgage with a condition to 'pay or discharge, or cause to be paid, within the

> time prescribed by law, all such taxes and assessments as shall by any lawful authority * * * be levied and imposed upon such premises above described.' "

The court further says (Opinion, p. 550):

> "The sole question presented in this case is whether the stipulations above quoted imposed upon the mortgagor the duty of paying the taxes assessed under a law subsequently passed, providing for an assessment against the mortgagee's interest."

It was a contest between the two, in other words, in view of the change of the law, which one of them was obliged to pay the taxes. It raised no constitutional question, and no such question was discussed in the case. It was only a question of contract.

The next case cited by the State was the case of Edwards v. The People, 88 Ill. 340. We have already called attention to the fact, in this brief, that the Constitution of Illinois is very different from the Constitution of the State of Indiana. Its provisions will be found in its Constitution, under the head of "Revenue," Article IX, Sections 1, 3 and 6. It provides that,

> "The General Assembly shall provide such revenue as shall be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

The only provision in the Illinois Constitution is that it shall pay by valuation. Certain exemptions are also therein provided for, which we do not stop here to quote. We have already said that we do not quarrel with the proposition that indebtedness may be deducted from credits. It might, perhaps, also be deducted from real estate, as we have said, if it were done ratably and with uniformity, but the deduction of an arbitrary amount, without reference to whether it can be taxed to anybody else or not, is the thing which we object to in this State, and this case does not turn upon that proposition. It is true it decides that the fact that certain credits and deductions may be allowed any person for personal property does not establish a want of uniformity, but, under the assessment provided by Section 27, quoted in the State's brief, all indebtedness is deducted on each person. This preserves a ratio; but when it comes to deducting an arbitrary amount, as seven hundred dollars, as we have already shown and argued in this case, ratio and uniformity are thrown to the winds. If, like the Connecticut law, there had been a provision that all indebtedness which should be deducted should be taxable to some other person or persons in the State, then the law would not have been open to the objections which we have made against it; but, when the amount is arbitrary, without ratio or uniformity, even this Illinois case does not sustain such a law or such a holding, nor has any case been decided in any State wherein an arbitrary amount, fixed by the Legislature, may be deducted without reference to ratio or uniformity. Under these circumstances,

of course, this Illinois case is not authority upon the proposition.

The Iowa statute was cited by the State, but no authorities were cited upon it.

Reference was made to the Kansas and Minnesota statutes, and to two citations:

> Bank v Barker, Treas., 24 Kans. 546; and
> State v. Jones, 24 Minn. 251.

The most cursory examination of the questions involved in the case of Bank v. Barker, Treas., 24 Kans., supra, shows that it has no earthly bearing upon this case. The Court opens its opinion by saying that "the sole question presented to the court for its decision in this case is the validity of Section 7, Chapter XC, of the laws of 1870," and the section is then quoted. It relates to the levy of township taxes, and the bank, who brought this suit, endeavored to compel the county to pay certain railroad bonds and coupons out of the taxes. There is no question like that in this case at all, and we can not see on what theory the case is cited. The case also held the law unconstitutional, and affirmed the judgment of the lower court. There is not the slightest suggestion in it that is relevant to the issues in this case.

The case of State v. Jones, supra, was a case where the State sought to compel the payment of certain delinquent personal taxes assessed against fifty thousand dollars' worth of notes. The circumstances attending the giving of the mortgage were these: The defendant owned land and

deeded it to one Gale for sixty thousand dollars, ten thousand dollars cash and fifty thousand dollars in notes. Both the land and the notes were assessed for taxation. Jones sought to avoid the payment of the taxes against the notes by alleging that, while there were no papers relating to the matter except the deed, mortgage and notes; yet, as a matter of fact, the property was simply deeded to Gale for the purpose of enabling him to handle it; that he was irresponsible, and was never expected to pay the notes; that the mortgage and notes, in other words, represented only one value. The whole case is a question of fact, and there was no question of exemption or deduction, or anything of that kind, in it. The court refused to permit the violation of the contract as expressed in the papers by the verbal contract, and held the taxes valid. There was no question in it which is in the slightest way relevant to the case at bar.

The case of People v. Savings Society, 51 Cal. 243, was cited. This was a case where the State sought to make the Hibernia Saving and Loan Association pay taxes on something in excess of eleven million dollars in mortgage securities on real estate situated within the State. The question, and the only question in the case, is, whether or not these were taxable property; and the court in that case held that they were not taxable property; they were choses in action, and not taxable. There is no question of deductions in the case, nor any question of exemption, nor any constitutional question, like the case at bar, at all. Three judges wrote concurring opinions, and another dissented,

in that case, but it does not have the slightest relevancy to any issue in the case at bar.

Hewitt v. Dean, 91 Cal. 5, was cited. In this case Hewitt sued Dean to foreclose a mortgage. There are three points in the case, the first and last of which are entirely foreign to any possible question in this case. The second point raised in the foreclosure of the mortgage was, that at the time of the execution of the mortgage there was an agreement made and entered into, which is set out in the opinion, to repay two and one-half per cent. of the interest to the owner of the property, or to allow him a rebate of that much upon the interest, if they presented a receipt for all the taxes upon the property on or before a certain day in December of each year. Answering to the foreclosure suit, the defendant said that this contract was illegal, and in violation of the clause of the Constitution which is referred to, and that by reason thereof the contract was a void one, and that the plaintiff could not collect any interest on his debt, and this was the issue in the case. The court goes on to show that in California, under their new Constitution, it was provided:

> "Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void."

This was the Constitutional provision. Section 4 of the same Article provided:

> "A mortgage * * * by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. * * * The value of the property affected by such mortgage, * * * less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof. * * * The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security."

This constitutional provision was passed for the purpose of avoiding the proviso, which had escaped notice, on mortgages which were executed in California, that the maker of the mortgage should pay not only the tax upon the property, but the tax upon the security. But the whole question was one of contract, and the court simply held that the agreement was solely on the part of the mortgagee, and was not binding or enforceable against the mortgagor. The court says:

> "It is well known that prior to the adoption of the present Constitution it was the universal custom for the mortgagee to incorporate into the mortgage a stipulation binding the mortgagor to pay all taxes that might be levied upon the mortgage or the debt secured thereby. * * * As a consequence * * * money loaned upon mortgage security escaped taxation, and the owner of the land mortgaged was compelled to pay more than his share of the expenses of government. It

> was for the purpose of obviating this consequence that the Constitutional Convention adopted the foregoing provision * * * . The provision thus incorporated into the Constitution was intended for the benefit of the borrower, but it is unnecessary to say that the results expected therefrom have not been realized. All experience has shown that the rate of interest is governed by the inflexible laws of trade, and is regulated by the same law of supply and demand as that which governs all other articles of commerce, and that Legislatures and Constitutional Conventions are powerless in their attempts to change this law."

The court then goes on to say that if by a contract between the parties, they made an arrangement that the owner of the property was not only required to pay the taxes, but upon the presentation of a receipt the interest thereon shall decrease and diminish, such arrangement is not only not in conflict with the letter of the Constitution, but is in direct harmony with its spirit and the evident purpose of its framers. It will be seen at once that there was no possible question in the case like the one at bar. And it will be noticed, too, that the California Constitution has the peculiar provision of the Oregon and Michigan law, making the security taxable in the State, and making the tax a lien upon it.

Finally, the State wound up its brief with a discussion of Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, which we have already discussed at some length in this brief. Having shown that the law to which it is related has been

repealed, and is no longer in force, we do not consider it worth while to take the time of the court to further discuss that case, especially as we have heretofore stated, in this brief, that we do not quarrel with the law which deducts indebtedness from credits. Our contention only is that this particular law, attempting to deduct an arbitrary amount from the assessment on real estate, is invalid and opposed to the constitutional provision, in view of the fact that no provision is made for taxing the mortgage against the mortgagee, where he is out of the State, and in view of the fact that no exception is made where the indebtedness is non-taxable property, whereby great quantities of property entirely escape and are exempted from taxation.

The State closed its brief by saying that the Chief of the Bureau of Statistics had furnished it the amount of deductions for the year 1900, and shows the amount for the entire State to be thirty-seven million, six hundred and sixty-five thousand, one hundred and thirty-three dollars and thirty-two cents, and assumes that more has escaped, and that the real amount is nearer forty millions, and yet, in the face of this very proposition the State is seeking to defend a law which adds another ten millions to the amount of this deduction. If this be the case, and we assume that these figures are correct, the State should, along with us, be asking the court to hold this law unconstitutional, instead of seeking, as it does in its brief, to add another ten millions to the amount of this deduction, which escapes taxation.

It is said, also, that "this law is a partial abatement of double taxation." On the other hand, we have shown that not only is it not an abatement of double taxation, but it renders it necessary to tax every other tax-payer an additional sum, or pro rata, in order to make up the losses of the property which will escape taxation by this vicious law. It said that it has looked in vain for the decision of any court of last resort in this country that declared a different doctrine from that set forth in its brief. If this be true, it need not look longer, for we have cited authorities in this brief which will certainly satisfy its curiosity. The fact that no provision is made to deduct only debts which are taxable against other parties, and only debts against persons in this State, is probably enough to exclude from taxation another forty million dollars, in addition to the amount hereby referred to by us. There will be practically ten millions of property represented by the loans from the school fund escape taxation if this law be held valid, and how much more, held by non-residents, is a matter that none of us can estimate, but certainly it will run into millions of dollars.

The real viciousness of the law, however, lies in the proposition that it is not a ratable deduction, but a deduction of an arbitrary amount, and provides two methods of assessment, so that property is no longer valued on a ratable basis, or with uniformity. Very substantial reasons have been given why this law should be declared unconstitutional; the authorities in Indiana have already held that there was, under the law, a "just valuation of all

property" before the passage of this Act; therefore, where the State gets any justification for the statement, in its brief, that if this law is stricken down the Constitution will not be complied with, we can not see. This law was a sporadic Act, engrafted upon a general system which has been declared constitutional. If there is any disturbance it is because this monstrosity has been injected into the law. True, we can not expect taxation to be perfect, nor that there will ever be any law of taxation which will not affect some individual injuriously, but, as the court, in its dissenting opinion, so pointedly says, in response to the charge that absolute equality of assessment can not be attained:

> "It is claimed that absolute uniformity and equality of assessment can not be attained, and therefore the law must be satisfied with something less. The answer to this proposition is that the obstacles to uniformity and equality contemplated by the courts which have used this language are those which inhere in the nature of things, such as the fallibility of men's judgment as to values, the mistakes and omissions of public officers, and the frauds of owners. They are never such inequalities and differences as are created by the law itself. While the efforts of the law to produce absolute uniformity and equality may be ineffectual, the Constitution demands that the taxing statutes shall aim at these objects, and that such statutes themselves shall be free from provisions which destroy them."

Our tax system was fairly good prior to the passage of this law, but this Act has injected into it the most incongruous thing that has ever been perpetrated upon any tax-paying people.

6. THE MAJORITY OPINION.

A reading of the majority opinion in this case does not seem to show any strong, logical argument upon which the results and conclusions of the court are based. It decides the questions, but the premises laid down in the opinions are not clearly stated, and the deductions do not always follow from the premises stated. The opinion opens with a sort of apology for the decision that is to follow.

1. It is proper, we admit, in cases which involve great constitutional questions, to approach the same with caution, and with due respect for the co-ordinate branch of the government which passed the law. But if the action of any co-ordinate branch of the government be erroneous and unconstitutional, there is the high duty of the judiciary, as the court of last resort, to speak out plainly and boldly, and strike down such a law as subversive of the popular right. No squeamish notion of respect for any co-ordinate branch should embarrass a court in such a case, or prevent it from pointing out the error and directing that co-ordinate branch into the true and beaten path of constitutional law.

It is an erroneous doctrine that "the judiciary" may not "lay claim to a conscience that is quickened beyond that of

any other official." It should lay claim to such a conscience, since upon it rests the great duty, at the end of all exhaustive examinations of every question, of determining right from wrong. It is this great privilege and right of the judiciary that should and does quicken its conscience beyond that of other officials. Other officials act with full knowledge that beyond them is another tribunal, constituted and empowered to correct errors, if any they shall make. But the court of last resort acts, on the other hand, with just as full knowledge that its decision is final, and that from its decrees there lies no appeal. Why should not its conscience be quicker, when, no matter whether its final decree be right or wrong, from that time forth it becomes the law to govern and direct men in their future actions? True, "courts do not sit for the purpose of obstructing legislative action," but it is erroneous to maintain that they do not sit to "revise legislative action." That is their high prerogative.

It is equally erroneous to maintain that the courts sit "to enforce the legislative will." They do not. It is their high prerogative and solemn duty, in the event the legislative will is subversive of constitutional right, to refuse to permit the enforcement of the legislative will, and quicken its conscience and direct its return to the path of rectitude.

The court should not approach the duty of passing upon the constitutionality of a legislative Act "with a disposition to enforce it," as seems evidently to have been the rule in this case; but, on the contrary, should approach

such a question with a calm determination to seek the right rule of law in the premises, and, when it shall have been found, to follow it, even though it conflicts with the legislative will and undoes it. This is the true law. To approach the question "with a disposition to enforce the legislative will" is to sit as a biased judge; yet, the court says in its opinion: "It is with this disposition of mind that we approach this question."

True, the extent to which the taxing power shall be exercised is in the Legislature, but it is there under the limitations set by the people in their Constitution. These great constitutional limitations the Legislature has no right to overstep, and when it does so the duty of the court is plain; it should speak out and say to the Legislature: "Thus far shalt thou go, and no farther; beyond this constitutional limitation you may not go." And it should speak vehemently and with knowledge of its power.

2. The next argument advanced is, that perfectly equal taxation is an unattainable good; but Judge Dowling, in his dissenting opinion, has so satisfactorily answered this argument that it need be discussed no further.

3. The court say, in deciding this case: "As a general rule, taxes due on property are not debts of the owner thereof," and cites Thompson v. McCorkle, 136 Ind. 484. A reading of the opinion in that case will show, it seems to us, that, so far from holding that doctrine in this State, the court holds and announces just the opposite doctrine in the very case cited, on pp. 500-502. But, if this be true,

it wholly destroys the argument of the court's opinion. The opinion says:

> "If it can be fairly said that the equality limitation in the Constitution was designed to prevent inequalities in the assessment of different tracts of real estate, considered as a matter wholly apart from the interest of their owners therein, then there would be room for serious doubt as to the justification of legislation that discriminates within the class, and which permits a deduction of $700 in the assessment on one tract of mortgaged real estate, while that right is wholly denied as to an adjoining, unincumbered tract of real estate."

If "taxes due on property are not debts of the owner thereof," as the opinion alleges, and cites authorities to show, it must follow that the taxes are assessed upon the realty, without reference to the owner. This being true, the taxes being an assessment against the land and not the owner, the opinion admits too much, for it admits that "then there would be room for serious doubt as to the justification of legislation that discriminates within the class, and which permits a deduction of $700 in the assessment on one tract of mortgaged real estate, while that right is wholly denied as to an adjoining, unincumbered tract of real estate." In truth, here the court, starting with the assertion that "taxes due on property are not debts of the owner," admits the unconstitutionality of the law involved in such a case. The court then adds:

> "When the people put the equality limitation upon the power to tax, they intended thereby to protect the owners of property. We must, therefore, regard the limitation that taxation must be equal as being satisfied when there is no discrimination as between tax-payers."

This is just the point we contend for, that there is discrimination between tax-payers in this law, as we so plainly showed, even among the class within the pale of the law, as well as against those without the law. The minority opinion in this case makes this feature of the law so clear that it can hardly be conceived how it is not plain to every one.

4. Then, proceeding, the court seems to us again to admit the infirmity of this Act when it says:

> "The selection of some objects for taxation and the omission of others, * * * does not necessarily disturb the rules of equality, * * * But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible."

What stronger argument could we ask in this case than this? The Act in question has been plainly shown to discriminate between holders of realty—even between holders of incumbered realty, also. For, if A's property is assessed for $1,400, and is mortgaged for $700, and is re-

lieved of taxation on fifty per cent. of the value; and, on the other hand, if B's property is assessed for $1,000 and mortgaged for $700 balance of purchase money, and he is relieved of seven-tenths of his taxation, there is no equality and no ratio in this.

Again, if A's property be assessed at $2,100 and is mortgaged for $700, he pays on $1,400, or two-thirds value; while, if B's property is assessed at $1,000 and is mortgaged for $700, he pays only on three-tenths of the value. The discrimination between those of the class seems to us so evident that we can not conceive how the court can escape the consequence, or avoid the conclusion, under its own statement of the case, that the act is unconstitutional. But the court does not apply the law to the fact. To us it seems that the court's opinion itself demonstrates the infirmities of the law quite as plainly as we have tried to do it in our brief.

5. Again, it seems to us, the court, in the opinion, admits the case when it says: "We may freely grant that with this Act in force it will produce inequalities as between taxpayers in any given year." But the court adds: "We confidently affirm that it is beyond the ken of the most astute to say who will receive the most benefit from it in the future."

True, if one were left to speculation, it would be "beyond the ken of the most astute" to know how the law would operate. But this law has now been in force since March 4, 1899. Marion County alone has demonstrated its inequalities to a nicety. For a long time our tax rate

was substantially $1.65. At the next levy after this law went into force it was forced up to $1.85. In 1900 it was forced up to $1.92; in 1901 to $1.95; in 1902 to $2.08. So we are not left to speculation. Marion County is but a miniature State, and the operation of the law is no longer speculative. The inequalities of its operation have been plainly demonstrated; the rate has gone steadily up since the law was enacted, to the detriment of the owner of unincumbered realty. The law offers a premium for remaining in debt, and for placing and keeping that debt in the form of a mortgage debt.

We have plainly pointed out, in our brief, the persons "prejudiced thereby" and the inequalities of the law, and the minority opinion of the court, better than we have done it, demonstrates with remarkable clearness the unconstitutionality of the law and the disastrous results that must follow holding it constitutional, and how clearly it violates existing precedent and previous decisions.

It may be too much to affirm that laws "must at all times operate fairly, as applied to any individual," but it is not too much to expect that each and every law must "operate fairly" so far as the principles inherent in the law itself are concerned, and there, as the minority opinion shows, lies the distinction.

The very case cited by the court to sustain its opinion (C., C., C. & St. L. Ry. Co. v. Backus, Treasurer, 133 Ind. 513) condemns this law. It holds that "the provision of the State Constitution providing 'for a uniform and equal rate of assessment and taxation' is complied with

when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation." (Opinion, pp. 535-6.)

But this Act violates both propositions:

1st. As we have just shown above, the ratio is fifty per cent. in one case, three-tenths in another, and varying in each case under the law to fit the various conditions of the taxpayer's property, with no two cases exactly alike. Hence, a varying and ever changing ratio.

2d. The basis of assessment for realty not mortgaged is its fair, cash value, while this law provides, upon its face and by its terms, that "the valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation." Thus making two bases for taxation of realty, instead of "one fixed basis" in the same taxing district. Each feature of the law violates one of the basic principles of the Constitution.

Exactly the same doctrine is announced in the other case between the same litigants, decided a few days later. (133 Ind. 625.)

Neither does it seem to us that there can be any conflict between the first and second clauses of Section 1, Article X, of the Constitution. The first prescribes a "uniform and equal rate of assessment and taxation." The second requires the Legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property," etc. The first clause provides for uniformity and equality of rate in the district; the second relates only to honesty

and justice in the appraisement or valuation. The second permits no modification of the first. That is absolute. Uniformity and equality are absolutely necessary; they may not be wanting in a constitutional law. Yet both are wanting in this law.

The second clause relates only to the machinery for valuation for taxation; prohibits exemptions, except for the specified purposes, and authorizes the Legislature to prescribe such regulations for the control of the Assessor as shall secure a just valuation. One can not conceive any condition in which these two clauses could conflict. Uniformity and equality must be there. This means identical rate within the taxing district. Valuations, under the rate, must be just valuations, not discriminating between man and man, nor exempting or deducting as between one and another.

The court says, however, that "the regulations that the General Assembly are required to enact must look to the securing of a just assessment," etc. Not so! The court misquotes the law. The General Assembly can not prescribe anything of that kind. The first clause provides for this. The constitutional provision is not that the Legislature prescribe such regulations as shall secure a "just assessment," but the language of the constitutional provision is, "such regulations as shall secure a just valuation"—not just assessment. The assessment is provided for in the first clause, which requires uniformity and equality. The only thing that may vary is the valuation, not the assessment. The assessment must be equal and uniform. The valua-

tion may vary with men's judgment, or desires to favor one person or another, and the Legislature must prescribe regulations which shall prevent assessors from making anything but "just valuations," but it has no discretion as to the assessment.

This is just the error into which the court has fallen. It has confused "just assessments" with "just valuation." Valuations may be varied to meet justice and worth. The assessment, which is that made upon the valuation, may not be varied; it must be as provided by the first clause—uniform and equal. The court is confused in its mind by applying this adjective to the assessment instead of to the valuation. The constitutional provision permits only regulations for just valuations, not just assessments, for the assessment follows inevitably, under the uniform and equal rate clause, and can not be varied as between different persons. And this is the weakness of this law. It varies the rate, and not the valuation. These two things the court has, doubtless inadvertently, confused. It is not necessary to "subordinate the one requirement to the other." They do not clash, conflict nor cross one another. They do in the mind of the court, as this opinion shows, but that is because the court has confused assessment with valuation. The provision is not for just assessment, but "just valuation." The assessment follows necessarily, at the prescribed rate of the district, and can not be varied, under the Constitution. Fit these two provisions of this Section 1, Article X, into their places. Each fits; neither trespasses upon the other's place. Every word is given force

and meaning, and no conflict between them can arise. It is the court's interpretation that requires construction. Under our interpretation it needs none; it is plain; each provision supports the other, and neither overlaps, conflicts or interferes with the other.

We submit, in all fairness, that our interpretation is the correct one. Under our interpretation no occasion arises for the court to determine whether the General Assembly may provide for "the taxation of real estate according to the actual interest of the owner therein." No such license is permitted by the constitutional provision. The valuation must be the "just valuation" of the property, without reference to the interest of the owner. That takes care of itself. Under this provision of the Constitution there can be no other rule.

The court says:

> "Many cases uphold the right of a State to enact a law that apportions the value of land for taxation upon the basis of the actual interest of the mortgagor and mortgagee, respectively, therein."

We hope we may be pardoned if we say this is hardly a fair statement of the law. Let us state it. A few cases have upheld the right of a State to enact a law that apportions the value of land for taxation upon the basis of the actual interests of the mortgagor and mortgagee therein. But such cases have always been cases where the law taxes the mortgage as realty, at the situs of the land, which this Act of ours does not do. The court ignores, also, the de-

cided cases, which say that this may not be done, and is not the law where there is no law taxing the mortgage at the situs of the land, and making the mortgage realty, for the purposes of taxation. To those cases we called the court's attention in our brief, but the court passes these decisions by without notice in its opinion. We refer to the case of Holland v. Commrs. of Silver Bow County, reported in 27 L. R. A. 797. There the court decided four propositions:

1. That the State has no power to tax mortgages held by nonresidents at the locus of the mortgaged property;

2. That mortgage indebtedness held by a nonresident mortgagee must be taxed at his residence;

3. That a debt, for purposes of taxation, is situated at the domicile of the creditor; and

4. That in the absence of a law making the mortgage taxable at the situs of the land, the mortgage is taxable at the domicile of the creditor. That in the absence of a law like that of Oregon and Michigan the old and usual rule shown in the Indiana cases cited obtains.

We have no such law as Michigan and Oregon in Indiana, and the above rules, and cases cited thereto in our brief, show that in Indiana, where there is no law making mortgages realty for purposes of taxation, and making them assessable at the situs of the land, the old and usual rule applies. The necessary conclusion follows that mortgages can not be deducted from the value of lands, except where the mortgage is taxable at the situs of the land, as in Michigan and Oregon.

6. As the court refers to Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, we must again call attention to the fact that that case was decided under a law not now on the statute books. Personal property, like notes, etc., is not taxable property, but the surplus, after deducting debts, is, by the statute, made taxable property. Here net value obtains, of course; there is no other way of interpreting the statute; but this is not the statute relative to realty at all. We have not stopped to discuss the Act as to personal property, for the reason that it is not involved in this cause, although we have our own views as to its constitutionality. It is true, Section 1, Article X, does not say "the gross amount of all notes, accounts and other choses in action shall be taxed." In truth, it does not mention notes, nor any other property specifically; it says, on "all property, both real and personal, excepting," etc., and then follow the exceptions. This does not mean net property, either, as the court seems to hold it to imply. There is thus no way to justify this Act except to hold that when this constitutional provision says "all property," it means, or may mean, "net value" of property after deducting $700 of mortgage lien. We do not see how it is possible to put any such construction upon a constitutional provision.

7. The court holds the law is not special. Whether or not this Act is special legislation has been so fully argued in this brief, and so clearly demonstrated in the opinion of the minority of the court, that it seems to us nothing further need be said on the question. If they are not convincing on the proposition, we do not see how we can make it plainer.

8. The court closes the majority opinion by saying that it has been suggested that the Act is invalid under the provisions of the Fourteenth Amendment to the Federal Constitution, but he is "not inclined to give further expression to our views upon this subject." He then proceeds, however, to say that, as "particularly applicable to this question * * * we quote," and then proceeds to set out a number of decisions from authorities in the Federal Court which seem to sustain the majority opinion, at least in the mind of the Court. To us the opinions cited only state general propositions, which all concede, and which nobody denies, but which are not applicable to the peculiarities of the present law. This law does, it seems to us

1. Abridge the privileges and immunities of citizens of the United States;

2. Deprive persons of property without due process of law; and

3. Deny to persons within the jurisdiction of Indiana the equal protection of the law.

It abridges the privileges and immunities of citizens, because, under this law, the privilege and immunity of being relieved of certain taxes is granted to one citizen and the other is excluded. It is an exemption from debt and taxation. To tax one person more, or another less, because the debt which is a lien upon his property is a mortgage debt, instead of any other or different kind of a lien, is to deprive the person who is without the purview of the law of his property without due process of law. In like manner such a law also denies to the person who is without the purview of the law the equal protection of the law.

It seems to us that the case of Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, decides this whole question. There the question was one of attorney's fees, which the statute provided should be recovered in cases of stock killed, when the claim did not exceed fifty dollars. The court says:

> "The single question in this case is the constitutionality of the act allowing attorney's fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases." (Opinion, pp. 152-153.)

The Supreme Court of the State held the law valid. The opinion says:

> "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They can not appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the suc-

> cessful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Continuing, the court says, on page 155 of the opinion, that while it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification,

> "yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in State v. Loomis, 115 Mo. 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employes any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies, at the option of the holder, at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.'"

We can not quote all of this opinion, but on this question of classification it is all very much in point, and we must ask the court to read it. It shows, clearly, how unlawful the classification in this exemption Act is. The court sums it all up in these pithy words:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." (Opinion, p. 159.)

By this case we see that classification can not be made on the color of men, white or black; nor on the basis of the age of men; nor on the basis of the amount of wealth they possess, because these are distinctions which do not furnish any proper basis for the attempted classification. What is it, then, that makes mortgage indebtedness on realty alone, as distinguished from indebtedness with or without lien on realty, or personalty, a proper classification for deduction from taxation? To us it seems that a bare statement of the case shows, at once, that such a classification for exemption or deduction is not one contemplated by the Constitution.

The rule is plainly stated to be that the classification "must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." The classification made by this law we have shown in our brief to be without any such basis, and a purely arbitrary one. What law can justify it?

Again, this opinion says: "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." What difference is there between debts secured by mortgage on realty, as distinguished from debts

secured by mortgage on personalty, or by liens of other description, either on realty or personalty, which naturally makes a class, so that the mortgage debt can be lawfully exempted from taxation. Certainly none.

This opinion further says (p. 154) that it is the duty of the courts to be watchful for the constitutional rights of the citizens against "any stealthy encroachments thereon," like this very law.

Upon this question of unlawful discrimination by this species of classification by the Legislature the recently decided cases of Thomas Connolly & William Dee v. The Union Sewer Pipe Co., decided by the Supreme Court of the United States March 10, 1902, are in point. The opinion is published in the Advance Sheets, No. 46.

The cases were the so-called "Trust Cases," involving the constitutionality of the Illinois trust law. The law is quoted in full in the opinion. Section 1 defines what shall be a trust. Section 9 provides that "the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The point is made that this section was an unlawful discrimination, and rendered the law unconstitutional. This point the Supreme Court held to be well taken and declared the Illinois trust law unconstitutional on the ground of unlawful discrimination. The case is interesting. The discussion of this portion of the case is found upon pp. 10 to 20 of the opinion. The court says "the vital question is" whether the statute of Illinois violates the Fourteenth Amendment of the Constitution of the United States. The court says of the law (Opinion, p. 13):

> "Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock," etc.

Then it is shown that the law excludes all other combinations. The court holds that this is discrimination and fatal to the law, and, discussing such arbitrary classification by the Legislature, says (Opinion, pp. 15-16):

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a clas-

> sification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' (Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 155, 159, 160, 165.) These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co., 183 U. S. 879, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

Here the natural class is debtors. But the very title of the Act limits it to debtors owning realty incumbered by mortgage. These provisions have been so fully gone over in our brief that we need not again do more than call attention thereto.

A case much like the case at bar was decided in Pennsylvania, and the law was held unconstitutional. The Act provided a tax upon all persons, firms, associations or corporations employing foreign-born, unnaturalized male persons over twenty-one years of age within the commonwealth. The Act is in principle exactly like the one at bar. The court, in vigorous and appropriate English, holds the Act unconstitutional and a violation of the provisions of the Fourteenth Amendment.

> Frazer v. McConway & Torley Co., 82 Fed. R. 257 (259-60).

See also on these questions:

Railroad & Telephone Cos. v. Board, etc., 85 Fed. R. 302 (317-318);
Atchison, etc., R. R. Co. v. Matthews, 174 U. S. 96.

Uniformity in taxing implies equality in the burden of taxation, and this equality of burden can not exist without uniformity in the mode of assessment as well as in the rate of taxation.

Exchange Bank of Commerce v. Hines, 3 Ohio St. 1;
The Railroad Tax Cases, 13 Fed. R. 722 (735).

These railroad tax cases were decided upon this very mortgage deduction question, and the law was held unconstitutional because it did not permit the railroads to deduct their mortgage indebtedness. The cases are exactly in point on this law. The court says (Opinion, p. 736):

> "There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property."

It is an identical case with the one at bar. The whole opinion is much in point in this case. The opinion is too long and too elaborate to quote, and we must ask the court to read it.

The Railroad Tax Cases, 13 Fed. R., pp. 722 et seq.

"Where the organic law of a State had brought every citizen in the State into one constitutional class for the purpose of taxation, and has provided that taxes shall be assessed and levied on value as the only basis, it is not competent, under the form of classification, to divide up this class and thus violate the Constitution."

Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. R. 168.

"It may be as well to say, in this connection, that it is now established that the constitutional requirement of uniformity in taxation applies to the mode of assessment as well as the rate of levy."

Railroad & Telephone Cos. v. Board, 85 Fed. R. 302 (307).

The whole opinion in the latter case is much in point, and clearly demonstrates that this law is unconstitutional.

We submit to the court that there is error in the decision of the Supreme Court of the State of Indiana, and that its ruling upon the questions involved should be reversed and this law declared unconstitutional.

Respectfully submitted,

HAWKINS & SMITH,

Attorneys for Plaintiff in Error.

ROSCOE O. HAWKINS,
HORACE E. SMITH.

October 25, 1903.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 81.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA, PLAINTIFF IN ERROR,

v.

THE STATE OF INDIANA ON THE RELATIONS OF MARTHA LEWIS AND BENJAMIN LEWIS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Two points have been raised in the brief of the defendant in error which were not referred to in our brief because not anticipated, and because their briefs were not received in time to do so. The points are:

1st. That plaintiff in error does not present any question for the determination of the court, because he is not a person in interest.

2d. That a ministerial officer cannot defend in a mandamus proceeding on the ground of the unconstitutionality of the law.

We will discuss them in their order.

I.

Has the plaintiff in error such an interest in the cause of action that he either may or must prosecute the action? He certainly has such an interest that he not only may but must prosecute the action. He is a public officer—the county auditor—striving to protect and conserve the public interest and collect the public revenues. The Attorney General is in the anomalous position of seeking to deprive the public of part of its revenue by enforcing deductions.

With the doctrine that a court will not "listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it" (Cooley's Const. Lim., 6th ed., p. 196), we have no quarrel; neither do we quarrel with the doctrine of the several cases, Clark *v.* Kansas City, 176 U. S., 114; Red River Valley Bank *v.* Craig, 181 U. S., 548; Giles *v.* Little, 134 U. S., 645. They only hold that a person without interest cannot prosecute a cause. This is true. But the cases do not fit this cause. The auditor or any other public officer whom it is sought to mandate to perform any alleged public duty has such an interest in the litigation that he not only

may but he must prosecute an action to a finality. It is his duty so to do. Hence the cases cited are not authorities in the case at bar.

In this sort of an action the granting of the deduction is the equivalent of giving of a credit for so much tax or the drawing of a warrant.

In any view of the case, whether the officer has a personal interest in the question, or if the nature of the office is such as to require him to raise it, he may make defense and it is his duty to do so.

Denman *v.* Broderick, 111 Cal., 97.
Norman *v.* State Board, 93 Ky., 537.
Von Schmidt *v.* Wilbur, 105 Cal., 151.
Smith *v.* Broderick, 107 Cal., 644.

IV.

Can a ministerial officer defend a mandamus case on the ground of the unconstitutionality of a law?

Upon this question the cases are in irreconcilable conflict.

19 Enc. Law., p. 764.

It is always a question of the particular case. In their brief the State cite People *ex rel. v.* Salomon, 54 Ill., 39. This is not a mandamus case at all, but a case involving a contempt proceeding. But, admitting it so holds, yet in—

People *v.* Soloman, 46 Ill., 333;
People *v.* Miner, 46 Ill., 384;
Madison Co. *v.* People, 58 Ill., 456;
People *v.* Thompson, 155 Ill., 451,

exactly the opposite doctrine was held, and all were mandamus cases in which it was sought to mandate an officer to perform some prescribed duty and wherein he answered that the statute was unconstitutional.

If the State of Florida held as shown in Commissioners of Franklin Co. *v.* State *ex rel.*, 24 Fla., 55 (Def't's Brief, p. 12), it also held the contrary doctrine in McConihe *v.* State, 17 Fla., 238, and State *v.* Hooker, 36 Fla., 358.

The State cites (Brief, pp. 11 to 17) twelve cases from eight States, but of these eight States five have also decided the same question the other way; these are Louisiana, Illinois, Nebraska, West Virginia, and Florida. The Illinois and Florida cases are cited above. The others are:

State *v.* New Orleans, 42 La. Ann., 92.
State *v.* Judge, 5 La. Ann., 756.
State *v.* Moore, 40 Neb., 854.
State *v.* Wyoming Co., 47 W. Va., 672.

But arrayed against this doctrine are some sixteen State and the Federal court in following cases:

Hoover *v.* McChesney, 81 Fed., 483.
Huntington *v.* Worthen, 120 U. S., 97 (101–102).
State *v.* Stout, 61 Ind., 143.
Denman *v.* Broderick, 111 Cal., 97.
Brandenberg *v.* Hoke, 101 Cal., 101.
Smith *v.* Judge, 17 Cal., 547.
Patly *v.* Colgan, 97 Cal., 251.
Maynard *v.* Board, 84 Mich., 226.
Public Schools *v.* Allegheny Co., 20 Md., 449.

State *v.* Baltimore Co., 29 Md., 516.
Police Coroners *v.* Louisville, 3 Bush (Ky.), 597.
Auditor *v.* Haycraft, 14 Bush (Ky.), 384.
State *v.* Medaris, 1. Kan., 90.
Savannah *v.* State, 4 Ga., 26.
State *v.* Mason, 153 Mo., 23.
State *v.* McKenney, 5 Nev., 194.
Humboldt Co. *v.* Churchill, 6 Nev., 30.
Peli *v.* Newark, 40 N. J. L., 71.
Laxewood Tp. *v.* Brick Tp., 55 N. J. L., 275.
Peafle *v.* State Board, &c., 129 N. Y., 360.
McDermott *v.* Dennie, 6 N. Dak., 278.
State *v.* Mitchell, 31 Oh. St., 592.
State *v.* Whitworth, 8 Lea (Tenn.), 594.
Williams *v.* Taylor, 83 Tex., 670.
State *v.* Saux Co., 62 Wis., 376.

The true doctrine is that every case stands upon its own facts. Here the auditor, a public officer, is in the attitude of defending the public revenue against dissipation and unlawful credit under an unconstitutional law. This is a case where the auditor not only may but must defend, and upon this very ground.

The State, we submit, is in error in stating (Brief, pp. 18–19) that the court in the first appeal "held the law constitutional and valid in every particular." The judgment in that case was not a final judgment—not one which could be taken by writ of error to the United States court. The judgment in the original case was "judgment reversed with instructions to the court below to overrule the demurrer to

the application and alternative writ, and for further proceedings not inconsistent with this opinion" (Record, p. 20). This was not a final judgment, and the two appeals, though twice docketed, are in reality but one cause.

Respectfully submitted.

HAWKINS & SMITH,
Attorneys for Plaintiff in Error.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,

v.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS,
Defendant in Error.

No. 81.

Brief for Defendant in Error.

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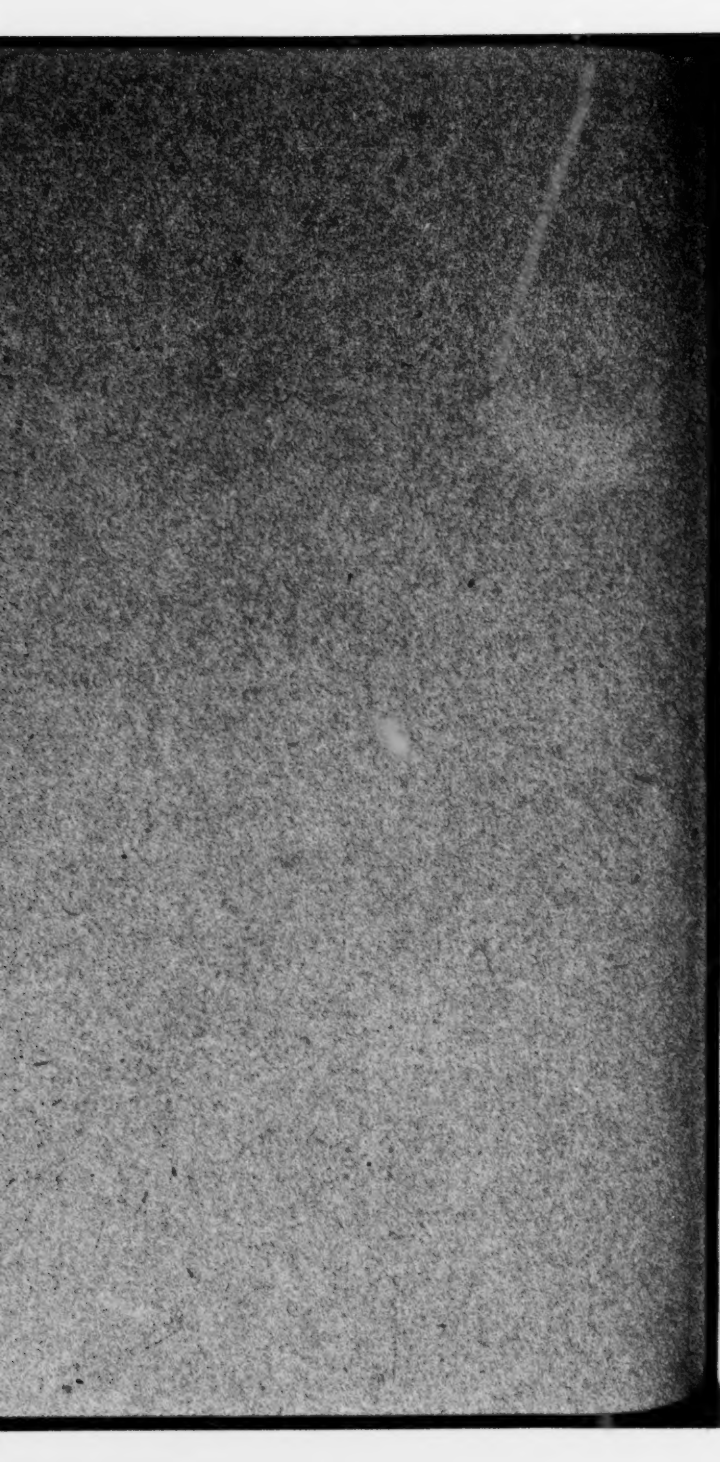

IN THE

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HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,

v.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS,
Defendant in Error.

No. 81.

Brief for Defendant in Error.

STATEMENT OF FACTS.

The statement of the case by the plaintiff in error fully covers the substantial matters necessary for a full general understanding of the questions involved in this appeal, and we will add nothing thereto.

We can not conceive how the exordium of plaintiff in error's brief has any place in a brief in this honorable court, but it is so misleading in all of its parts we feel that it should not go unchallenged. The law was drawn by the

then attorney-general of the state upon the almost universal demand of the small real estate owners. It was never a political question, both parties as the records show, supporting it, it passed the senate on a vote of 28 to 17 and the house by a vote of 84 to 4 or in a total of 133 votes cast, the "narrow majority" was 89.

Not a single court in the state outside of the Marion circuit court ever held the law unconstitutional nor has the constitutionality of the law ever been questioned in any other court of the state that has come to the knowledge of the legal department of the state. The writer of this brief has been an assistant in the office of the attorney-general of the state continuously since the passage of the act in question. Hundreds of letters have been received from all over the state asking for instructions and interpretations of the law, but not one was ever received by the legal department questioning its constitutionality, as is shown by the records of said office.

Of the ninety-two county auditors in the state all except the plaintiff in error endeavored to faithfully obey it and perform their duties under it, as is shown by the records in the auditor of state's office, and there was no confusion outside of Marion county until this suit was brought and the judge of the circuit court decided the law unconstitutional.

As to the effect upon the valuation of assessable property, plaintiff in error is auditor of the county and he knows or can easily know that the total assessed valuation in Marion county, as shown by the settlement sheets in the auditor of

state's office made by plaintiff in error for the year of 1898, before that law was passed, was $141,335,225, that for the year 1900, the assessed valuation of Marion county, less the mortgage deductions was $145,939,405, or $4,604,180 more than 1898, for the years of 1901 and 1902 the deductions were not made until the decision in this case by the supreme court, so that the increase in the tax rate can not be attributed to the decrease in taxables.

The law is a popular law with the masses, and only obnoxious to those mortgage holders whose mortgages have been uncovered by the affidavits of the mortgagors and placed upon the tax duplicates by the county assessors of the several counties and made to bear their share of the burdens of government.

THE DECISIONS OF THE HIGHEST STATE COURT ON STATE CONSTITUTIONS AND STATUTES ARE CONTROLLING IN THIS COURT.

Under the rules of this court the decision of the supreme court of Indiana, sustaining the validity of the statute in question is controlling as to any question of conflict between it and the state constitution, and all of those parts of plaintiff in error's brief that undertake to attack the law, except in so far as it is repugnant to the federal constitution, is irrelevant.

In the case of Adams Express Company v. Ohio, 165 U. S. 194, on page 219, Chief Justice Fuller, speaking for the court, says:

> "The contention that the act in question is invalid, because repugnant to the constitution of the

> state of Ohio, has been disposed of by the decision of the highest tribunal of that state, sustaining its validity. State v. Jones, 51 Ohio St. 492. These cases fall within no recognized exception to the general rule that the construction by the state courts of last resort of state constitutions and statutes will ordinarily be accepted by this court as controlling."

In the case of Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, on page 688, Mr. Justice Brewer, speaking for the court, says:

> "So far as respects any mere matter of procedure, or of conflict between the statute authorizing the condemnation or the proceedings had thereunder and the constitution of the state, the decision of the court of appeals is conclusive. West River Bridge Company v. Dix, 6 How. 507; Bucher v. Cheshire Railroad, 125 U. S. 555; Adams Express Company v. Ohio, 165 U. S. 194. Our inquiry must be directed to the question whether any rights of the water supply company secured by the constitution of the United States have been violated."

In the case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, on page 462, Mr. Justice Brewer, speaking for the court, says:

> "It is sufficient to say, in reference to this contention, that the decision of the supreme court of the state of Pennsylvania, sustaining the statute, is conclusive in this court as to any question of conflict between it and the state constitution."

Citing—

West River Bridge Co. v. Dix, 6 How. 507;
Bucher v. Cheshire Railroad, 125 U. S. 555;
Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232;
Lewis v. Monson, 151 U. S. 545;
Adams Express Co. v. Ohio, 165 U. S. 194;
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

In the case of Rasmussen v. Idaho, 181 U. S. 198, on page 200, Mr. Justice Brewer, speaking for the court, says:

> "The judgment of the supreme court of Idaho establishes that there is no conflict between this legislation and the constitution of the state, and it is not within the province of this court to review that question. Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461, and cases cited in the opinion.
>
> "The single question, therefore, for our consideration, is whether this legislation conflicts with the federal constitution."

In the case of Williams v. Parker, 188 U. S. 491, on page 502, Mr. Justice Brewer, speaking for the court, says:

> "That the statute does not conflict with the constitution of the state is for this court settled by the decision of the state court."

So, under the foregoing authorities, it is clear that unless plaintiff in error can show to this court that the act in

question abridges the privileges or immunities of citizens of the United States, or deprives any person of life, liberty or property, without due process of law, or denies to any person within its jurisdiction the equal protection of the laws, he must fail in this appeal.

DOES THE PLAINTIFF IN ERROR PRESENT ANY QUESTION FOR THE DETERMINATION OF THIS COURT?

It will be observed that plaintiff in error is prosecuting this writ of error not in his individual capacity, but as auditor of Marion county, Indiana. The record does not disclose wherein his constitutional rights have been infringed or affected in any manner, nor does the record show that the plaintiff in error belongs to, or comes within, any of the classes of persons claimed to be injured or affected by the statute in question.

The case, as he presents it, is in the nature of a moot court question; there is no showing, in fact, that any citizen's rights are infringed or denied, except that it is averred in the return to the writ that they may be, or that it is possible to be; but it is nowhere averred that plaintiff belongs to a class that is in any way affected. It is not even averred that he is a tax payer, or a resident of the county, or of the United States. He brings this suit in the character of a sort of loco parentis for the whole state, a character we contend that is not warranted by the law.

This court will not listen to objections made to the constitutionality of a statute by a party whose rights it does not affect, and who has no interest in defeating it.

In Cooley's Constitutional Limitations, 6th ed., p. 196, the learned author says:

> "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. And a party who has assented to his property being taken under a statute can not afterwards object that the statute is in violation of a provision in the constitution designed for the protection of private property. The statute is assumed to be valid, until some one complains whose rights it invades."

In the case of Clark v. Kansas City, 176 U. S. 114, the above quotation from Cooley is quoted, and Mr. Justice McKenna, speaking for the court, on page 118, says:

> "We concur in this view, and it would be difficult to add anything to its expression."

In the case of Red River Valley Bank v. Craig, 181 U. S. 548, on page 557, the court say:

> "One of the amendments contained in the last statute, which provides a means for the enforcement of a lien by the sale of the whole premises in the case of repairs upon a building already covered by a mortgage, was probably passed because of the

above decision of the Dakota court, and we need not concern ourselves as to its validity, because the plaintiff in error does not occupy such a position as to enable it to raise that question, the whole building in this case having been erected subsequently to the mortgage. The same may be said as to any question which might upon other facts be raised because of the cutting off of an existing mortgage not yet due and the (claimed) impairment of the obligation of a contract by the sale of the premises under the provisions of the amended statute.

"The mortgage in this case was past due and had been foreclosed and the land sold in 1894, subject to the lien on the building provided by the statute then in existence. One who does not belong to the class that might be injured by a statute can not raise the question of its invalidity. Supervisors v. Stanley, 105 U. S. 305; Clark v. Kansas City, 176 U. S. 114, 118; Lampasas v. Bell, 180 U. S. 276, 283."

In the case of Texas and Pacific Railway v. Johnson, 151 U. S. 81, on page 98, Mr. Chief Justice Fuller, speaking for the court, says:

"Nor can jurisdiction be maintained on the ground that a right of immunity was claimed under the authority exercised by the receiver in virtue of the order of the circuit court of the United States, which right or immunity was denied, as in McNulta v. Lochridge, 141 U. S. 327. The judgment was in favor of the receiver and the writ of error is brought by the company, and it is well settled that the right or immunity must be one of the plaintiff in error and not of a third person only."

In the case of Ludeling v. Chaffe, 143 U. S. 301, on page 305, Mr. Justice Gray, speaking for the court, says:

> "In order to give this court jurisdiction of a writ of error to review a judgment of a state court against a right claimed under a statute of the United States, that right must be one of the plaintiff in error, and not of a third person only. Giles v. Little, 134 U. S. 645. The immunity or privilege of the assignee in bankruptcy from being cited in these proceedings could only be set up by the assignee himself, or by a person claiming under him, and not by a person claiming under a conveyance from the bankrupt before the bankruptcy."

In the case of Jones et al. v. Black et al., 48 Ala. 540, on page 543, the court say:

> "Nor will a court listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specially affect. An act of the legislature will be assumed to be valid, until someone complains whose rights it invades; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of constitutionality can be presented and sustained. Cooley, page 164; Dejarnette v. Haynes, 23 Miss. 600; Dorman v. The State, 34 Ala. 216, 249, and the cases cited.
>
> "A party who seeks to have an act of the legislature declared unconstitutional, must not only show that he is, or will be injured by it, but he must also show how and in what respect he is or

> will be injured and prejudiced by it. Injury will not be presumed; it must be shown."

In the case of Giles v. Little, 134 U. S. 645, on page 650, Mr. Justice Gray, speaking for the court, says:

> "But it is certain that they neither had nor claimed any interest in the title acquired by Miles under those judgments. It is well settled that, in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only. Owings v. Norwood, 5 Branch. 344; Montgomery v. Hernandez, 12 Wheat. 129, 132; Henderson v. Tennessee, 10 How. 311; Hale v. Gaines, 22 How. 144, 160; Long v. Converse, 91 U. S. 105. The title set up by the defendants being that of a third person, in which they have no interest, the writ of error is dismissed for want of jurisdiction."

To the same effect are the cases of—

> Wellington, Petitioner, 16 Pick. 87;
> Gustavel v. State, 153 Ind. 613;
> City of Kansas City v. Union Pac. Ry. Co., 59 Kas. 427.

From the foregoing authorities, it seems clear that plaintiff in error has no right to prosecute his writ of error in this court, since he does not show that he has any just cause for complaint.

A MINISTERIAL OFFICER CAN NOT ADJUDGE A LAW UNCONSTITUTIONAL ON THE GROUND THAT IT MAY AFFECT THE RIGHTS OF OTHERS, AND REFUSE TO PERFORM HIS PLAIN DUTIES THEREUNDER, AND EXCUSE HIMSELF BY ATTACKING THE CONSTITUTIONALITY OF THE ACT.

The county auditor in the state of Indiana is a ministerial officer. The duties laid upon the auditor by the act in question are purely ministerial duties; they in no way affect his rights as an officer, and it was his duty to obey the legislative will. He had no right to question the legislative authority merely because the exercise of his functions might affect third parties in such a way as to be violative of the constitution.

It has been decided by numerous cases throughout this country that it is the duty of a ministerial officer to obey the law, and not to question it; that a ministerial officer is not vested with judicial authority, and clothed with the right to pass upon the constitutionality of an act that prescribes certain duties for him to perform. Especially is this true of a ministerial officer charged with collecting the revenues, as it is recognized that a speedy collection of the revenues for the purposes of government is all important, and that delays and confusion are always injurious to the welfare of the municipality.

In the case of People, ex rel., v. Salomon, 54 Ill. 39, on page 46, the court say:

> "To the law every man owes homage, 'the very least as needing its care, the greatest as not exempted from its power.' To allow a ministerial officer to decide upon the validity of a law would

be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is, subjection to the laws."

In the case of Commissioners of Franklin County v. State, ex rel., 24 Fla. 55, on page 63, the court say:

"The duty of the commissioners being merely to receive and keep in their official custody the returns, as indicated, such duty involves no consideration by them of the legality of the election held under their call, nor does it permit them to raise before us the question of such legality as a reason for not performing their stated functions; nor does its performance decide or conclude anything as to the legality of the election, but merely preserves the evidence of the actual result of the same as shown by the returns. The statute has not given, even if it could do so under our constitution, to them the power to decide any such question, nor is this a proceeding for us to decide it in, nor are the proper parties before us. As county commissioners they are not charged with the duty of raising the question in behalf of those who may have personal interests, which the enforcement of the nineteenth article of the constitution may affect. If they have such personal interests themselves, these interests do not attach to their official duties as commissioners, and can not be permitted to stand in the way of their performance. If there be any person in Franklin county whose personal interests the enforcement of such article affects, the county com-

missioners are not the tribunal authorized to pass upon either the validity of the act or the legality of its enforcement. The validity of such act, and of the proceedings thereunder, will be considered when parties having interests affected by either are before us."

In State v. Shakespeare, 41 La. Ann. 156, on page 166, the court say:

> "A government whose laws can be ignored by those whose duty it is to execute them is feeble, weak and inert, and is wanting in that vigor, strength and energy that will insure its perpetuity. The mayor and council of the city of New Orleans are the officers of a subordinate political corporation not only charged with municipal duties, but as a constituent part of the state government they owe allegiance and obedience to their sovereign, the state of Louisiana, whose majesty, dignity and power they must uphold and whose mandates they must obey. They can not defy the law, constitute themselves the judges of its constitutionality, and pronounce upon its validity when they are charged with its execution, in advance of the judicial tribunal, whose sole prerogative it is to pass upon its constitutionality. It is their duty to obey the law until the law has been declared null and void by the judicial department of the government."

In the case of Bassett v. Barbin, 11 La. Ann. 672, on page 673, the court say:

> "He has accepted the office with all the functions belonging to it by law; and he has no business to

question the validity of those legislative enactments which constitute his official rule of action."

In Steele, ex rel., v. Auditor, 47 La. Ann. 1679, on page 1696, the court say:

"In mandamus proceedings against a public officer, involving the performance of official duty, nothing can be inquired into but the question of duty on the face of the statute, and the ministerial character of the duty he is charged to perform. After a careful investigation of the authorities, we feel fully confirmed in the correctness of the conclusions we arrived at in Nicholls, Governor, v. Shakespeare, Mayor, and other cases, to the effect that executive officers of the state government have no authority to decline the performance of purely ministerial duties, which are imposed upon them by a law, on the ground that it contravenes the constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so, the most inextricable confusion would inevitably result, and produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government. 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' The result of this conclusion is, that the respondents are

without right to urge the unconstitutionality of the concurrent resolution which is involved."

In the case of State, ex rel., v. Stevenson, 18 Neb. 416, on page 421, the court say:

"While it will not be denied that any citizen may invoke the provisions of the constitution, state or federal, for the assertion or protection of any of his rights, either of person, family, or property, yet it may well be doubted that the incumbent of a ministerial office, created by and whose current duties rest solely upon legislative authority, may invoke the provisions of the constitution as a justification of his refusal to discharge a plain statutory duty. Under our present system, lawsuits may be prosecuted or defended only by a real party in interest. Such party only has the right to make a record which will render the question litigated res adjudicata."

In State, ex rel., v. Douglas County, 18 Neb. 506, on page 508, the court say:

"The presumption is that the legislature has done its duty, and that an act passed by it is not in conflict with the constitution, and it is the duty of all ministerial officers to obey it until the act is declared invalid."

In the case of Smyth v. Titcomb, 31 Me. 272, on page 286, the court say:

"A public officer entrusted with the collection and disbursement of revenue, in any of the depart-

ments of the government, has no right to refuse to perform his ministerial duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may, possibly, be unconstitutional. He is not responsible for the law, or for the possible wrongs which may result from its execution. He can not refuse to act, because others may question his right. The individuals to be affected, may not doubt the constitutionality of the law; or they may waive their supposed rights or wrongs; or may choose to contest the validity of the enactment, personally. Public policy, as well as public necessity and justice, require prompt and efficient action from such officers."

In the case of Tremont School District v. Clark, 33 Me. 82, on page 483, the court say:

"The collector, having a warrant from competent authority, was bound to proceed under it. With the anterior proceedings he had no concern. An officer appointed to collect the public revenue must, ex necessitate rei, obey his warrant, and he will be protected in so doing. He holds in his hands the sinews of government, and neither his fears that individuals may be injured, nor his doubts about the validity of anterior proceedings, will excuse him. If individuals are injured, they have their remedy at law, or they may see fit to waive any injury they have received. The collector has no judicial power. He is only to know whether his warrant proceeds from competent authority."

In the case of Wright v. Kelly (Idaho), 43 Pac. 565, on page 567, the court say:

> "Mandamus is an appropriate remedy to be employed against delinquent tax collectors to enforce the performance of their duties; nor, in such cases, can the respondent, as a ministerial officer, object that the act of the legislature authorizing the tax is unconstitutional, since it is not within the province of such officers to determine the constitutionality of laws; nor will the courts, upon summary proceedings in mandamus, determine as to the constitutionality of statutes fixing the rights of third persons, not parties to the suit."

In the case of State, ex rel., v. Buchanan, 24 W. Va. 362, on page 383, the court say:

> "The revenue is the life of the government; and it is necessary that there should be no delay in its collection. The machinery for its collection must be kept in motion and must not be stopped by assessors or other inferior officers for the purpose of testing the legality or illegality of a tax law. It is no concern of the assessor, as such, whether the tax is illegal or not."

In the case of Thoreson v. State Board of Examiners, 19 Utah 18, on page 31, the court say:

> "To allow mere ministerial officers, who have no direct personal interest in the matter, to refuse to perform an act clearly pointed out and made their official duty, by a statute, on the ground that the performance of the act would violate the constitution, would be establishing a very dangerous precedent, and one not warranted by the authorities.

> It would be deciding a constitutional question, affecting the right of third parties, at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question, and can not in any event be made impossible. We are of the opinion that this ground of objection furnishes no excuse for the failure of the board to perform a plain ministerial duty prescribed by the governor and legislative assembly of the state, and that we are not authorized to pass upon the constitutional question so raised in a proceeding by mandamus."

What rules of action for ministerial officers could be more clear or founded on greater reasons than those above laid down?

But the foregoing cases arise where a ministerial officer has taken upon himself to adjudge a law unconstitutional in the absence of any interpretation by the highest court of his state.

What standing, then, can a ministerial officer have when he challenges a law that has been declared by the highest court of his state to be a constitutional and valid law?

In the case now before the court, as the record shows, the supreme court, in the original proceeding between the plaintiff in error and defendant in error, held the law constitutional and valid in every particular, and, after such judgment of the supreme court, plaintiff in error filed his return to the alternative writ, in which he again denied the constitutionality of the act, in the face of the decision of the supreme court, and it is upon this second

denial of the constitutionality of this law by this ministerial officer, that this cause is now before this court.

The decree of the supreme court was recognized and obeyed by the judge of the Marion circuit court, the judicial officer charged with the duty of first passing upon the constitutionality of the laws of this state, but this petty ministerial officer, whose duties and functions are purely statutory and subject to the legislative will, refuses to be bound by such a decree of the highest court, and still insists that he shall not perform the functions of the office, prescribed by the legislative and judicial mandate, not because any of his rights are affected or infringed, or because his property is taken without due process of law, but because, forsooth, some third person's property or personal rights may be injuriously affected if he performs the duties that the legislative and judicial departments of the state government have said he shall perform. If the act in question does abridge the rights of third persons there is time enough for this court to so declare when properly requested so to do.

The evils of permitting a ministerial officer to assume judicial authority and pass upon the constitutionality of a law prescribing his duties is strongly illustrated in this case. Here, the auditor is one of the important wheels in the machinery of the collection of revenues for sustaining the government. By refusing to obey the law in question he delayed and threw into confusion the collection of the taxes, state, county and city, of the richest county in the state.

We insist that under this state of facts the plaintiff in error has no standing in this court, and has no right to invoke the power of this court to aid him in refusing to obey the law enacted by the legislature, and decreed by the highest judicial body of his state to be a valid law for his guidance and authority.

It should be constantly borne in mind that this act has been approved by the supreme court of the state of Indiana, and that all questions as to uniformity and equality of assessment, and just valuation for taxation of property, have been fully settled, as far as the state of Indiana is concerned; that all questions as to whether any of the provisions of said act are repugnant to any provision of the constitution of the state of Indiana, have been determined and set at rest, and the only question before this court is whether said act, or any of its provisions are repugnant to the fourteenth amendment of the federal constitution.

Does said act, or either of its provisions, abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws? That is the question and the only question this court is called upon to decide.

By the enforcement of this law is any burden laid upon any citizen of the United States that is not laid upon citizens within the jurisdiction of the law, that are in similar circumstances and under the same conditions? Is any immunity given to any citizen that is not given to all citizens who are in similar circumstances and under like conditions?

These are, we take it, the only questions for this court to determine, and in determining the same it will perhaps be instructive to consider some of the other laws of the state of Indiana in relation to taxation.

Section 8410, Burns R. S. 1901, provides as follows:

> "All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Section 8411 provides:

> "For the purpose of taxation, real property shall include all lands within the state and all buildings and fixtures thereon and appurtenances thereto excepting in cases otherwise expressly provided by law; personal property shall include all goods and chattels within the state, all ships, boats and vessels belonging to inhabitants of this state whether at home or abroad, and their appurtenances; all goods, chattels and effects belonging to inhabitants of this state situate without this state, except the property actually and permanently invested in business in another state shall not be included; all indebtedness due to inhabitants of this state above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, and whether such debtors reside within or without the state; all shares in corporations organized under the laws of this state when the property of such corporation is not exempt or is not taxable to the corporation itself; all shares in banks organized in this state under any law of the United States, but in estimating the value of such

shares deduction shall be made of the value of all real estate taxed to the bank; all shares in foreign corporations except national banks, owned by inhabitants of this state; all moneys; all circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency; all annuities and royalties; all interests owned by individuals in lands, the fee of which is in this state or in the United States, except as hereinafter provided. Property exempted from taxation by the laws of the United States shall not be included. Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholders. Lands sold by the state, including lands forfeited to the sinking fund, the university fund and all other trust funds though not granted or conveyed shall be assessed in the same manner as if actually conveyed. All lands reserved to or for any individual by any treaty between the United States and any Indian tribe or nation shall be liable to taxation from the time such treaty shall have been confirmed."

Section 8412 provides what property shall be exempt, and is as follows:

"The following property shall be exempt from taxation:

"First. The property of the United States and of this state.

"Second. The property of any county, city, town or township.

"Third. All lands granted for the use of the common schools, so long as the same shall remain unsold.

"Fourth. The personal property and real estate of every manual-labor school or college incorporated within this state when used or occupied for the purpose for which it was incorporated, such real estate not to exceed three hundred and twenty acres.

"Fifth. Every building used and set apart for educational, literary, scientific or charitable purposes by any institution, or by any individual or individuals, association or corporation, or used for the same purpose by any town, township, city or county, and the tract of land on which such building is situate; also the lands purchased with the bona fide intention of erecting buildings for such use thereon, not exceeding forty acres; also the personal property, endowment funds and interest thereon, belonging to any institution, town, township, city or county, and connected with, used or set apart for any of the purposes aforesaid.

"Sixth. Every building used for religious worship, and the pews and furniture within the same, and also the parsonage belonging thereto and occupied as such, and the land whereon said building or buildings are situate, not exceeding ten acres when owned by a church or religious society, or in trust for its use; also every cemetery."

Section 8414 provides for a rebate of the taxes upon property that has been destroyed, and is as follows:

"In all cases where buildings or personal property shall be destroyed, in whole or in part, by un-

> avoidable casualty, after being assessed for the year, and such loss is not covered by insurance, the county auditor shall, upon sworn proof of such loss, allow a rebate of such proportion of the taxes for that year as that part of the year which shall remain, after such destruction, bears to the whole year."

Section 1, Article X, of the constitution (see Burns R. S. 1901, Section 193) provides for the assessment of property, and is as follows:

> "The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

For the purposes of this case, and in this court, this law should be held to be in accord with the foregoing provisions of the constitution, and laws of the state of Indiana.

DOES THE ACT IN QUESTION ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, OR DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, OR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS?

Whether the act in question is an exemption law or a deduction law is not a pertinent inquiry here. Such question was presented to and decided by the only proper tribunal, the supreme court of the state, a decision this court

will respect even if plaintiff in error does not. What will amount to a violation of the fourteenth amendment of the federal constitution has never been precisely defined, and, from the nature of things, never can be; but this court has laid down some well established rules to be applied in determining the question as it relates to the facts and circumstances of each individual case.

In the case of Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, on page 292, Mr. Justice McKenna, speaking for the court, says:

> "This brings us to the law in controversy. The appellant attacks both its principles and its provisions—its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.
>
> "Is the act open to this criticism? The clause of the fourteenth amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax cases, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the

liabilities imposed. Hayes v. Missouri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may safely be said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile county v. Kimball, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.'

"The rule therefore is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporaton than B, it may subject A to a different rule of responsibility to servants than B, Missouri Pacific Railway v. Mackey, 127 U. S. 205, to a different measure of damages than B, Minneapolis &

St. Louis Railway v. Beckwith, 129 U. S. 26, and it permits special legislation in all of its varieties. Missouri Pacific Railway v. Mackey, 127 U. S. 205; Minneapolis & St. Louis Railway v. Herrick, 127 U. S. 210; Duncan v. Missouri, 152 U. S. 377.

"In other words, the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The case of Bell's Gap Rd. Co. v. Pennsylvania, 134 U. S. 232, is a leading case upon this question, and is frequently cited in subsequent opinions of this court.

In that case, by the law of Pennsylvania, all moneyed securities were subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which were taxed at three mills on the dollar of their nominal or par value.

The railroad company objected to paying this tax upon the par value of its scrip, bonds and certificates of indebtedness, contending that said act was in violation of the fourteenth amendment of the federal constitution. On page 236, Mr. Justice Bradley, speaking for the court, says:

"AS TO THE ASSESSMENT OF THE TAX OF THREE MILLS UPON THE NOMINAL OR FACE VALUE OF THE BONDS, INSTEAD OF ASSESSING IT UPON THE ACTUAL VALUE.

This might have been subject to question under the state laws; but the state courts have upheld the assessment as valid. We are to accept it, therefore, as part of the state system of taxation, authorized by its constitution and laws. Then, how does it

violate any provision of the constitution of the United States? It is contended that it violates the first section of the fourteenth amendment, which forbids a state to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

"But, be this as it may, the law does not make any discrimination in this regard which the state is not competent to make. All corporate securities are subject to the same regulation. The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable

> limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

Applying this decision to the facts in the case now before the court, it seems that very little is left to be said.

In the case of Pacific Express Company v. Seibert, 142 U. S. 339, Mr. Justice Lamar, speaking for the court, on page 351, says:

> "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the

> amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

The case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, presents a case very similar to the case at bar. This case was brought under a law that provided that in case banks or savings institutions in the state of Pennsylvania should elect to collect annually from the shareholders thereof a tax of eight mills on the dollar upon the par value of the shares, and should pay them into the state treasury on or before the first day of March of each year, so much of the capital and profits of such bank as was not invested in real estate should be exempt from local taxation; but, in case such bank or savings institution did not elect to so collect and pay its taxes, its shares should be assessed and taxes collected thereon at their actual value, and it was contended that this act violated the fourteenth amendment of the federal constitution on account of its lack of uniformity, and, upon this point, Mr. Justice Brewer, speaking for the court, on page 463, says:

> "If it be said that a lack of uniformity renders the statute obnoxious to that part of the fourteenth

amendment to the federal constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the federal constitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent. in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the federal constitution.

> "Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety *of such inducement*, we need look no further than the present litigation. It is common practice in the states to offer a discount for payment before the specified time, and impose penalties for non-payment at such time. This, of course, results in inequality of burden, but it does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all. It was well said by Mr. Justice Williams, speaking for the supreme court of Pennsylvania, in the opinion in the present case: 'The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand.' "

This opinion, it seems to us, effectually answers the argument of plaintiff in error that by reason of the deduction of mortgage indebtedness in the state of Indiana, other property is compelled to bear more than its share of the public burdens.

In the case of Clark v. Kansas City, 176 U. S. 114, heretofore cited, Mr. Justice McKenna, speaking for the court, on page 119, says:

> "The reasoning of the cases we need not repeat. It is enough to say that the rule of the constitution leaves to the discretion and wisdom of the state a

> wide latitude as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to correct the impolicy and injustice of state laws, and the equality it prescribes is not for persons merely as such, but according to their relations."

That the act in question does not violate the constitutional rule of uniformity in taxation and method of assessing for the purpose of the same, is so ably argued in the majority opinion on the petition for rehearing in this cause, in the supreme court of Indiana, that we here present it, quoting from page 579 of the opinion, being page 34 of the record:

> "The authorities are against appellee on the subject of classification. In addition to the authorities cited in the principal opinion, we cite Edwards v. People, 88 Ill. 340, 347, and People v. Barker, 155 N. Y. 330, 332, 49 N. E. 940. In the former case the supreme court of Illinois said: 'It is also objected, that the revenue law is unconstitutional, because the method of assessing is not uniform. The fact that certain credits and deductions may be allowed in the assessment of personal property, does not establish a want of uniformity. Where a law operates alike upon all persons and property like situated, it may be regarded as uniform. This, as we understand our revenue law, is its practical operation. Perfect equality in taxation is a problem of difficult solution.' In the New York case the court of appeals reached the same conclusion, but upon a somewhat different course of reasoning. The

court said: 'The right to have debts deducted from the value of taxable property is not an absolute one, but in the nature of a favor. The state may grant or withhold it at pleasure. It was in the power of the state to tax all the property the relator had without providing for any deduction on account of debts. It can not, therefore, be said that a law which permits the deductions as to certain debts and forbids it as to other debts, violates any constitutional provision.'

"On the subject of classification it is not difficult to accumulate extreme statements made by courts in the condemnation of statutes that so offend, but it materially conduces to a more intelligent understanding of the effect of such decisions if such statements are read in connection with the enactments they condemn. But if we may venture to attempt to extract the cardinal principle from the many discordant opinions upon the subject of classification, we may say that it will be found that what they condemn is a classification that is arbitrary, because it is not founded on differences recognized by the constitution, or naturally inhering in the subject-matter of the legislation to an extent that would at least suggest some reason why the law-making power, acting in a presumed spirit of fairness, should have made the distinction. As stated before, we perceive in the statute under consideration a substantial reason for distinguishing between mortgages or defeasible sales and mere liens. And there is also a substantial reason for not permitting such deductions from personal property generally, since it is a fact, so well known as to be judicially

> recognized, that real estate bears more than its proportion of the burdens imposed by the state government."

The law applies equally to all persons who own real estate upon which there is a mortgage to secure a debt owed by the owner. There is no arbitrary class to which it applies; it does not exclude any one under like conditions or circumstances. As is so concisely stated in the opinion of the supreme court of Indiana in this case (see Opinion, p. 550, and page 15 of the record):

> "As to the requirement of uniformity, we have to say that the act in question purports to be a law that is uniform throughout the state, and, as it permits all persons to take advantage of it when their circumstances bring them within its operation, we are of the opinion that it does not violate that requirement of the constitution. Cleveland, etc., R. Co. v. Backus, 133 Ind. 513, 18 L. R. A. 729; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625; Gilson v. Board, etc., 128 Ind. 65, 11 L. R. A. 835."

Counsel argue at great length and with much ingeniousness that we have no property deductions in this state; that what is called a deduction of debts owning from credits owing to the person taxed, is not a deduction, but simply a taxation upon the net balance due the person sought to be taxed upon the debts owing to him, and counsel cite section 8411 Burns' R. S. 1901, in proof of this proposition. That portion of the said section relating to this proposition is as follows:

> "All indebtedness due to inhabitants of this state above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, and whether such debtors reside within or without the state."

The argument of counsel on this proposition seems to be a vigorous argument on the difference between twiddledee-dum and twiddledee-dec. By whatever name it may be called, there is a deduction of indebtedness owing from indebtedness due. The same legislature that enacted the last above quotation, in the same act also provided the form of schedule that should be used by the assessors in listing the property of the different individuals in the state. This schedule is so expressive of what was intended by the above quoted portion of the act that we here insert a copy of it, just as it is found in the act:

PERSONAL PROPERTY—CREDITS.

Number.	Description of Property.	Valuation by party.	Valuation by assessor.
1	All annuities	$...	$.....
2	All bonds	....	.....
3	All notes secured by mortgage	....	.....
4	All other notes	....	.....
5	All accounts	....	.....
6	All other amounts due me from any person, firm or corporation, except for moneys deposited with banks, corporations, firms or individuals	....	.....
	Total credits due me	$...	$.....
	From the sum of the above credits I claim a deduction of the amounts of my bona fide indebtedness, as follows: Value of all notes owing by me		

Name of Payee.	Date of Maturity.	Amount.
.....	.....	$...
.....	.....	....
.....	.....	....
.....	.....	....
Value of accounts owing by me		....
Total bona fide indebtedness which should be deducted from my credits		....
Leaving balance for which I should be assessed		....

Burns R. S. 1901, sec. 8463.

It will be seen from this schedule that the person making the list shall first enumerate and describe his credits, and

give the total of the same. Following this he must give the names and date of maturity and amounts of indebtedness owing to him under the heading: "From the sum of the above credits I claim a deduction of the amounts of my bona fide indebtedness, as follows." After the account of the debts owing to him, and the value given, follows the statement: "Total bona fide indebtedness which should be deducted from my credits, leaving balance for which I should be assessed."

So, it is evident that the legislature in enacting the clause fully understood and intended that in the assessment of credits due, there should be deducted therefrom the amounts owing by such tax payer, and this is the substantial result, by whatever name it may be called. This law has been upheld and is in force and enforced in the state, and has been ever since the passage of the said act.

It was by reason of the fact that the tax payer who had his money invested in notes, bonds and accounts, and who also had debts, only paid upon the net value of his property, while the real estate owner, who had his money invested in real estate and his debts secured by a mortgage on such real estate, paid upon the gross valuation of his property, and was unable to deduct his debts, that brought about the demand for the enactment of the law in question.

The full text of the act involved in this case we here insert for the information of the court:

AN ACT concerning the taxation of real estate encumbered by a mortgage, and declaring an emergency.

[S. 17. LAW WITHOUT GOVERNOR'S SIGNATURE, MARCH 4, 1899.]

Section 1. Be it enacted by the General Assembly of the state of Indiana, That any person being the owner of real estate liable for taxation within the state of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year: Provided, That no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

Sec. 2. Any person desiring to avail himself, or herself of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or bona fide owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

Sec. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the state of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

Sec. 4. Any person who shall wilfully make a false statement of the facts provided for in section 2 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty nor more than five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

Acts 1899, p. 422.

That there may inequalities arise under this act we will admit, but this is true of every act enacted for the purpose of raising revenues. It has often been held that absolute equality in taxation is unattainable and impossible, under our present conditions, and what has been said about inequalities of this act could at least, in a measure, be said of every taxation act.

Is it a vicious act? Does it not, on the contrary, tend to equality and justice, under the system of taxation that obtains in the state of Indiana?

Suppose, for illustration, three persons—A, B and C.

A is worth $1,400, invested in real estate, and has no debts. B is worth $1,400, but has $2,100 invested in debts due and owing to him, but owes $700 on a note to a non-resident. C is worth $1,400, but has it invested in real estate of the value of $2,100, on which he owes $700 to a resident of the state, and which is secured by mortgage upon his said real estate.

Prior to the passage of the act under discussion, A would pay taxes on $1,400, the valuation of his real estate, the same being his net worth, and in proportion to his ability to pay. B would deduct his debt of $700 from what was owing to him, and pay his taxes on his net worth, or $1,400, the same being in proportion to his ability to pay. C would pay on the valuation of his real estate, or $2,100, or $700 more than his net worth, and, consequently, more in proportion to his abiltiy to pay than A or B. The holder of C's note would pay taxes on $700, the valuation of this note, provided it was divulged to the assessing officer; so this real estate for assessment purposes would represent $2,800, or $700 more than it was actually worth.

Now, under the act in question, A would pay taxes on $1,400, or his net worth. B, on his $1,400, or his net worth. C deducts the amount of his mortgage, and pays on $1,400, or on his net worth. Each has paid his proportion of the taxes, and in proportion to his ability to pay, and the amount deducted by C is paid on by the holder of C's note.

Which system is the more equitable? The question answers itself.

But counsel say that there are thousands of dollars loaned and secured by mortgages throughout the state by the state out of the school fund, and by non-residents and benevolent institutions, which pay no taxes. Is this any reason why the poor home owner, who has his home only one-half or two-thirds paid for, should make up such deficit or pay such taxes? Is it not more inequitable that the persons who are burdened with a mortgage on their real estate should bear the whole burden of this untaxable property than if it were apportioned to all the tax payers of the state?

In the dissenting opinion rendered in this case in the supreme court of the state the illustration is given of two lots valued at $1,400 each, one being incumbered with a mortgage for $700, and the other unincumbered.

On the first lot the owner is required to pay taxes on $700 only; on the second the owner is required to pay taxes on $1,400, and, referring to this situation, the learned judge says:

> "Call it what we may, the owner of the first lot enjoys an immunity which is denied to his less fortunate neighbors."

This is the first judicial expression that we have been able to discover that for a man to have a mortgage of $700 on a $1,400 lot was a fortunate circumstance, or that it was a situation to be desired.

I doubt very much if the one who had no mortgage would be willing to exchange places with what is denom-

inated his more fortunate neighbor—the one who has a mortgage of $700 on his lot.

But, it is contended that taxes are not debts. This is true in the broad general sense, that they are subject of legal suit, judgment and execution; but they are as surely liabilities that are enforceable against the owner, as any other obligation. The difference is that in an ordinary debt, suit may be maintained in our courts for collection, while taxes may not be so enforced, for the reason that they are obligations of statutory creation, and a full mode and manner is provided for the enforcement of their collection.

This is clearly expressed in the case of Gallup, Executor, v. Schmidt, Treas., 154 Ind. 196. On page 215, speaking to this point, the court say:

> "A tax is not an ordinary debt. It is not founded upon contract, express or implied. It flows from the exercise of sovereign power, and is imposed without the consent of the debtor. It is enforceable summarily, by distress and sale, and without exemption or relief from valuation laws. The right to assess property and levy taxes thereon is given by legislative enactment, upon such limitations and conditions as are imposed by the constitution."

The exact nature of the obligation or liability of taxes, when assessed against lands, is clearly set out in the case of Thompson v. McCorkle, 136 Ind. 484. On page 501, speaking to this point, the court say:

> "In answer to this we quote from Blackwell on Tax Titles (3d ed.), p. 547: 'In those states where

the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem., the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion, and remainder. In such case, the tax law itself is notice to the whole world of the liability of the land for all public assessments. * * * On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate—provides for a personal demand of the tax—and in case of default authorizes the seizure of the body or the goods of the delinquent, in satisfaction of the tax—and in terms, or upon a fair construction of the law, permits a sale of the land only, when all other remedies have been exhausted—then, the sale and conveyance by the officer, passes only the interest of him in whose name it was listed—upon whom the demand was made—who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover, in ejectment, only such interest as he may prove to have been vested in the defaulter at the time of the assessment. Any other construction of laws containing such provisions, would be in violation of the spirit which moved the legislature to enact them, and be the means of depriving innocent persons of their estates.'

"Our law requires the land to be listed in the name of the owner. Section 6378—a personal demand of the tax. Section 6427 authorizes the per-

sonalty to be first sold. Sections 6447, 6429—and the realty can not be sold as long as there is personalty to pay the tax."

Under our laws, taxes assessed on real estate are personal liabilities of the owner; that is, they may be collected by distress and sale of the personal property of the owner.

By section 8431, Burns' R. S. 1901, it is provided that all lands shall be assessed to the owner, if known.

Section 8571 provides for a demand and levy on personal property.

Section 8590 provides that all taxes, real and personal, shall be a lien on the real estate of the owner.

Section 8591 provides that all property, real and personal, shall be liable for all taxes of the owner.

Section 8603 provides that lands when put up to be sold for taxes, shall sell for the full amount of all taxes against the land, and also against the owner, and it has been decided by our supreme court in numerous cases, that land can not be legally sold for taxes when the owner owns leviable personal property within the county sufficient to pay the taxes assessed against him.

See

Abbott, Aud., et al. v. Edgerton, 53 Ind. 196; and cases cited.

So that, taxes assessed on lands are in reality assessed against the owner, and his whole property is bound to pay the same.

But it is urged that the act in question discriminates against other liens against real estate. It seems evident that mortgages are more than naked liens. As is said in the opinion in this case in the supreme court of the state on page 552:

> "While it is true that for most purposes a mortgage will be treated as a mere security for a debt, yet whenever it is necessary to render effective the rights of the parties, the courts still treat mortgages as forms of defeasible sales."

In the case of Savings Society v. Multnomah County, 169 U. S. 421, on page 428, Mr. Justice Gray, speaking for the court, says:

> "This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate."

Again, citing from an opinion of Mr. Justice Strong, of the supreme court of Pennsylvania, the same justice, in the same opinion, on page 429, says:

> "They are in form defeasible sales and, in substance, grants of specific security, or interests in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, and with all its incidents. And though it is often decided to be a security or lien, yet, so far as it is necessary to ren-

> der it effective as a security, there is always a recognition of the fact that it is a transfer of the title."

But with this matter this court has no concern; that is a matter left wholly with the state courts. But it is contended by plaintiff in error that the act is vicious because it provides an arbitrary amount that may be deducted; that is, not more than one-half the appraised value of the land, to an amount not to exceed $700.

Whose rights does this injuriously affect? Not the one who has unincumbered real estate, nor the one that has only personal property, for the limitation protects him, pro tanto. The only one in any way affected is the one sought to be benefited, and he certainly will not resist the law, for in so doing the morsel that has been given him will be taken away.

As is said in the majority opinion, on the petition for a rehearing in this case, on page 581 of the opinion, and page 34 of the record:

> "The provision that not more than one-half of the assessed value of the property shall be allowed as a deduction is not arbitrary, although some mortgagors may gain a greater benefit from the law than others. There is a basis in reason for such requirement, in that a wise public policy is conserved by an enactment that, even if it releases a property owner from a part of the burden of taxation, still leaves him some portion of such burden, because his vote or influence is by that consideration likely to be cast on the side of holding public officers to due

> economy in the administration of public affairs. In Cooley on Taxation, p. 170, it is said: 'Even within the class taxed, however, there may be rules of distinction; and these are perfectly admissible, provided they are general rules and are observed.' "

Again, it is said that it creates new assessment officers. We do not think this is the case, for as a matter of fact the auditor of a county in Indiana, under the laws of that state, is an assessing officer, and performs a very important part in the assessment and collection of taxes. He prepares and furnishes the assessors with their books and blanks; compels the banks to make statements of their property, and enters the valuations on such statements; lists all omitted property that comes to his knowledge. He is the secretary and member of the county board of review; makes up the tax duplicates, and performs many other duties in the assessment and collection of the taxes of the state.

It is also objected that there is no provision in the act in question for the listing and assessment of the notes secured by mortgage on which deduction is had. As to nonresidents, this is true, but as to notes held by residents of the state, the case is wholly different. Sec. 3 of the said act provides as follows:

> "Sec. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the state of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county

wherein the mortgagee, assignee, or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

And by the provisions of section 8560, Burns' R. S. 1901, it is made the duty of the auditor to list all property for taxation that comes to his knowledge, that has not been listed. And by section 8531, Burns' R. S. 1901, it is expressly made the duty of the county assessor to look after just such property as this. This section is as follows:

"As soon as such county assessor has qualified, he shall receive from the county auditor all returns of real and personal property made by the assessors of the several townships of the county, together with all assessment lists, schedules, statements, maps, and other books and papers filed with the auditor by said township assessors. It shall be the duty of such county assessor to make a careful examination of the tax duplicate of the county, and also of all other records and papers in the offices of the county auditor, treasurer, recorder, clerk, sheriff and surveyor, and to list and assess, at its true cash value, upon the proper township assessor's books and to the proper persons, all omitted assessable property, of every kind and nature whatsoever, including tax certificates, mortgages, debts, judgments, claims and allowances of courts and legacies and property in the hands of administrators, executors, guardians, assignees, receivers, trustees, and other fiduciaries. The valuation made on any omitted property by the county assessor shall be

entered in a separate column under the head of 'valuation by county assessor' immediately after the column containing the valuation by the township assessor in the several lists and returns of said township assessors. The county assessor shall have all the rights and powers given by law to township assessors for the examination of persons and property, and the discovery and assessment of property, and making lists and returns of the same. He shall on or before the first Monday after the 4th day of July in each year, make returns to the county auditor of all township assessor's books, returns, lists, schedules, maps, and other papers received by him from the auditor, together with such additional lists, assessments, books and papers as he has made thereto; and all assessments so made by the county assessor shall have the same force and effect as if made in the first instance by the township assessor. It shall also be the duty of the county assessor, at any time during the year, to list and assess upon the proper assessor's books in the office of the county auditor any omitted property that he may discover and which should be assessed; and the same shall be placed upon the duplicate by the auditor, and the taxes thereon extended and collected as in other cases. The county assessor is hereby authorized and required to advise and instruct all township assessors of his county as to their duties under the law, and for this purpose he shall visit each township assessor during the months of April or May in each year. The county assessor is also given all the powers hereinafter given to county auditors and treasurers as to assessment of omitted property after

> the meeting and adjournment of the board of county review in each year, and all provisions of sections 142 and 182 of this act, as to notice or otherwise so far as applicable, shall apply to such assessment by the county assessor as if the same were made by the county auditor or the county treasurer."

The act in question is only one of many that go to make up the complete system of taxation for the state, and when enacted all its provisions and duties attach themselves to all the taxing officers to which they extend. It may be "sporadic" but it nevertheless is firmly cemented into the body of the system of taxation of the state of Indiana, and a component part thereof.

That the county assessors and auditors have availed themselves of the information furnished by the provisions of this act is clearly evidenced by the tax returns. Plaintiff in error would have this court believe that the state of Indiana was in danger of being bankrupted by this act; that by reason of its enforcement the amount of taxables has been so reduced that the rates of taxation have been greatly increased.

The facts, however, do not bear out this assertion. The records of the auditor of state's office show that the total amount of taxable property in the state of Indiana in 1898, the year prior to the enactment of this law, was $1,311,411,483; that for the year 1899, the year the law was enacted, and before the county assessors were able to fully inform themselves from these affidavits and statements of

mortgages that were sequestered, the total assessed valuation of the taxables of the state was $1,337,746,698. The deductions under the act in question amounted to $27,500,000, leaving a net amount of valuation of taxables of $1,310,246,698, or, in round numbers, one million dollars less than the total amount of taxables in 1898.

In the year 1900, after the county assessors and auditors had opportunities to investigate these affidavits, and statements of mortgages and to list those that had been sequestered, the valuation of the state rose to $1,360,445,139. The amount deducted for mortgages was $34,389,394; leaving a net total amount of valuation of taxables in the state of $1,326,055,245, or an increase of over fifteen millions of dollars over 1898.

For the year 1901 the total amount of taxables as returned to the auditor of state was $1,397,981,497. The total amount of mortgage exemption, $35,169,250, leaving a net total of valuation of taxables of $1,362,812,247, or, in round numbers, fifty-one millions more than in 1898, or thirty-six millions more than in the year 1900.

The amounts have not been made up, and we are unable to give them for the years 1902 and 1903, but these illustrate that this court can not say that any one's rights are injuriously affected by this law; that, while $700 from the mortgage indebtedness may be deducted from the assessed value of the land, it discloses to the taxing officers a mortgage that may be many times more than $700, that has heretofore escaped taxation, and the results show that there has not been any appreciable reduction of the taxables

of the state, and this court would have to enter into the field of speculation to say that the rights and immunities of any citizen was abridged or that his property was taken without due process of law.

We contend, and some of the taxing officers of the state department believe and assert that this law has swelled the sum total of taxables on the assessment rolls of the state, instead of having reduced them.

Can this court say as a matter of law that increased burdens are placed upon some by reason of their being taken from others under this state of facts? And yet that is what the plaintiff in error in this case is asking this court to do.

The argument of this question strongly presents the force of our argument as to the right of this plaintiff in error to raise this question. Who does he represent? Who does he claim will be injuriously affected? Is it the holder of the mortgage, whose property has been uncovered by some affidavit of some poor home owner; or, is it the poor home owner, who has been relieved of taxes on $700 assessed against the property that he owns? Who is asserting that his rights are injuriously affected?

The plaintiff in error asserts that he brings his suit, or makes his return in this suit, as the auditor of Marion county. Then does the plaintiff in error contend that the act is repugnant to the fourteenth amendment of the federal constitution, because it abridges the rights and immunities, or denies the equal protection of the laws to the county auditors of the state?

These are all pertinent inquiries, it seems to us, in passing upon this question.

The great majority of the cases cited and propositions advanced in the brief for plaintiff in error are propositions that are properly raised and decided by the state courts under the particular provisions of the different state constitutions; but, as we have contended, and have demonstrated by the authorities, these are questions that are not before this court, but are questions that must be settled by the state courts.

It would be repugnant to the constitution of the state of Indiana to exempt any property except what is specifically enumerated in the constitution, from taxation, it is true, but whether such property has been exempted is a matter for the state court to decide, and such decision, under the rules of this court, would be controlling, unless there was a gross or flagrant abuse of power, or a glaring erroneous judgment.

So, in this case, the defendant in error contends that the plaintiff in error, under the circumstances of this case, has no standing in this court to raise a question upon the constitutionality of this act, as being repugnant to the fourteenth amendment of the federal constitution.

That all questions of exemption or deduction of proper or just valuation, and kindred subjects, in so far as they relate to the constitution of the state of Indiana, have been decided, and that decision is a controlling one with this court.

That the act comes within the rules laid down by numerous decisions of this court, providing for uniformity, classi-

fication and equality, required by the fourteenth amendment of the federal constitution.

And that the act does not abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

And we ask that the ruling of the supreme court of the state of Indiana, upon the questions involved, be affirmed.

Respectfully submitted,

CHARLES W. MILLER,
Attorney-General,
Attorney for Defendant in Error.

CASSIUS C. HADLEY,
Of Counsel.

No. 372.

Motion to advance.

FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

Filed Nov. 24, 1902.

Supreme Court of the United States

OCTOBER TERM, 1902.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,
v.
THE STATE OF INDIANA, EX REL. MARTHA LEWIS ET AL.,
Defendants in Error.

No. 372.
Error to the Supreme Court of Indiana.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE THE HEARING OF THE CAUSE.

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Error to the Supreme Court of Indiana.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE THE HEARING OF THE CAUSE.

The defendants in error move the court to advance the hearing of this cause.

This action was brought by the relators in the Marion circuit court of Indiana, by filing an application for a writ of mandate to compel the plaintiff in error, as county auditor, to allow a deduction of five hundred dollars from the assessed value of the relators' real estate, on account of an existing mortgage thereon for that sum.

An alternative writ of mandate was issued, to which the said auditor filed a demurrer. The demurrer was sustained. The relators declined to comply further, and electing to stand on said complaint, judgment was rendered for the plaintiff in error. Appeal was taken to the supreme court of Indiana, where the judgment of the circuit court was reversed, and the court below was instructed to allow the deduction of five hundred dollars, as prayed.

An act of the Indiana legislature of 1899 allows to each owner of property a deduction from the assessed value of his property of an amount not exceeding one-half of the value thereof, and in any event not exceeding seven hundred dollars, on account of any mortgage there may be upon said real estate.

About 80,000 tax-payers of Indiana have claimed these deductions. The total sum thus deducted from the tax duplicates of Indiana on account of such mortgages amounts to about $40,000,000 per year. The tax duplicates go to the county treasurers of Indiana on January 1st. The tax-payers have until the first Monday in May in which to pay these taxes. It is of the utmost importance not only to the 80,000 tax-payers who have taken advantage of this law, but all of the other tax-payers in the state, that the question involved in this case be speedily determined, to the end that all of said tax-payers may have their rights adjusted at the tax-paying time, and that the taxing officers may be advised what action to take respecting said deductions.

This case involves not only a very large amount of taxes claimed under such deductions, but also the whole principle of deductions from credits on account of indebtedness. There are allowed in each year about $40,000,000 of deductions from credits on account of indebtedness other than mortgage indebtedness. If these laws allowing such deductions are unconstitutional, it is of very great importance that the state may be so informed at the earliest possible day.

For these reasons, therefore, the defendants in error most respectfully and urgently ask that the hearing of this above entitled cause be advanced.

Respectfully submitted,

WILLIAM L. TAYLOR,
Attorney-General of Indiana,
For Defendants in Error.

The plaintiff in error joins in the request for the advancement of this cause.

Respectfully submitted,

ROSCOE O. HAWKINS,
HORACE E. SMITH,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

No. 81.—October Term, 1903.

Harry B. Smith, Auditor of Marion County, Indiana, Plaintiff in Error,
vs.
The State of Indiana, on the relation of Martha and Benjamin Lewis.

In error to the Supreme Court of the State of Indiana.

[November 16, 1903.]

This was a petition filed in the Circuit Court of Marion County by the State, upon the relation of Martha and Benjamin Lewis, against the auditor of Marion County for a writ of mandamus to compel the defendant, in his official capacity, to allow an exemption of a mortgage of $500 upon a lot of land in Indianapolis owned by the relators, and that the same be deducted from the value of such lot.

The petition was based upon an act passed by the General Assembly March 4, 1899, the first section of which declares: "That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year."

An alternative writ having been issued, defendant interposed a general demurrer, which was sustained by the court, and the relators declining to plead further, judgment was entered against them.

Upon appeal to the Supreme Court, the action of the court below was reversed, the law held to be constitutional and the cause remanded. (158 Ind. 543.) Thereupon the defendant made formal return to the writ alleging the unconstitutionality of the act, both under the State and Federal Constitutions, to which relators demurred. The demurrer was sustained, and a judgment entered for a peremptory mandamus commanding the defendant to allow the exemption, and to deduct from the assessed valuation of the real estate the amount of the mortgage, $500, and also that relators recover from the defendant their costs, which, however, appear never to have been taxed. This judgment was subsequently affirmed

by the Supreme Court upon the authority of its opinion upon the previous appeal, and a writ of error sued out from this court.

Mr. Justice BROWN delivered the opinion of the Court.

The constitutionality of the exemption law of Indiana was apparently the only question raised by the parties. It was argued elaborately, both in the Circuit and Supreme Court of the State, and was finally affirmed by a majority of the latter court. The power of the county auditor, who is charged by law with the duty of making the assessment, to refuse to allow the relators their exemption upon the ground of the unconstitutionality of the act, does not appear to have been raised in the State courts, and is not noticed in either opinion of the Supreme Court. In fact, the celerity of the proceedings and the admissions of counsel indicate that the suit was begun and carried on for the purpose of testing the constitutionality of the law, and that the litigation was at least not an unfriendly one.

We have no doubt of the power of State courts to assume jurisdiction of the case if they chose to do so, although there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution.

It is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event, it is a purely local question, and seems to have been so treated by this court in *Huntington* v. *Worthen*, (120 U. S. 97, 101.)

Different considerations, however, apply to the jurisdiction of this court, which we have recently held can only be invoked by a party having a personal interest in the litigation. It follows that he cannot sue out a writ of error in behalf of third persons. (*Tyler* v. *Judges of Court of Registration*, 179 U. S. 405; *Clark* v. *Kansas City*, 176 U. S. 114; *Turpin* v. *Lemon*, 187 U. S. 51; *Lampasas* v. *Bell*, 180 U. S. 276; *Ludeling* v. *Chaffee*, 143 U. S. 301; *Giles* v. *Little* 134 U. S. 345.) These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers, and in this particular the case is analogous to that of *Caffrey* v. *Oklahoma*, (177 U. S. 346.) We think the interest of an appellant in this court should be a personal and not an official interest, and that the defend-

ant, having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decision.

It is true there seems to have been a personal judgment in form against the defendant for costs, the amount of which, however, has never been taxed, and when taxed and paid would probably be reimbursed to him. It was formerly held, under the practice which disqualified interested witnesses, that a liability for costs was sufficient to render a witness incompetent. (1 Greenl. Ev. secs. 401, 402.) But it seems to be well settled that even if the fact that costs are awarded against a party, gives him an appealable interest, of which there appears to be considerable doubt, (*Travis* v. *Waters*, 12 Johns. 500; *Reid* v. *Vanderheyden*, 5 Cow. 719, 736,) it does not give him an appealable interest in the judgment upon the merits, but limits him to the mere question of costs. (*Studebaker* v. *Markley*, 7 Ind. App. 368; *Hone* v. *Schaick*, 7 Paige, 221; *Card* v. *Bird*, 10 Paige, 426; *Cuyler* v. *Moreland*, 6 Paige, 273.) If plaintiff in error objected to this judgment for costs he might have moved to modify it in that particular. Not having done so, his appeal is presumptively from the judgment on the merits, (*American Ins. Co.* v. *Gibson*, 104 Ind. 336, 342,) and as his individual rights were not affected by such judgment, he is not entitled to an appeal.

The fact that the various statutes fixing the jurisdiction of the Circuit Courts of the United States, and of this court, which from the original Judiciary Act of 1789 have, where the amount involved was made the test of jurisdiction, uniformly used the words "exclusive of costs," would indicate, so far as the Federal courts are concerned, that a mere judgment for costs could not ordinarily be made the basis of an appeal to this court.

For the reasons above given, the appellant did not have the requisite interest to maintain this appeal, and it is therefore

Dismissed.

Mr. Justice HARLAN and Mr. Justice WHITE are of opinion that the plaintiff in error was entitled to prosecute the present writ, and that the court should determine the case upon its merits.

True copy.

Test:

Clerk Supreme Court, U. S.